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ABSTRACT

This monograph is a legal treatise covering all legal aspects of the evaluation of teachers. It looks at what can legally be evaluated, how the evaluation can become evidence for termination, and how to avoid and win lawsuits involving wrongful teacher dismissals. It is intended for practicing administrators, supervisors of instruction, teacher evaluators, attorneys, college professors of education or law, and college students. Chapter 1 presents the basic concepts behind teacher evaluation and an introduction to the study of the laws pertaining to teacher evaluation. Chapter 2 describes the areas of teacher performance that legally can be evaluated. Chapter 3 explores the necessary elements of proceeding to terminate a teacher. Chapter 4 discusses due process, procedural aspects of the teacher's remediation opportunities, board policy, and collective agreements. Chapter 5 addresses competency testing as a prerequisite to certification and constitutional challenges to teacher testing. Chapter 6 focuses on defamation claims resulting from the evaluation process and lines of defense available to administrators or school districts in guarding against such claims. Included is an index of cases mentioned in the monograph. (WFA)

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The Law of Teacher Evaluation

Second edition

Lawrence F. Rossow and James O. Tate

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The Law of Teacher Evaluation

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Lawrence F. Rossow and James O. Tate

Education Law Association
Dayton, Ohio

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Introduction and Basic Concepts

Since the beginning of formal public education in America, teachers have been evaluated in some way or another by school authorities. Through time the evaluation process became more formalized. With the formalization of the process came a heightened awareness of the potential losses teachers could incur by negative evaluations. As a form of protection against terminations or other negative employment decisions, teachers began to use the law. Most teachers now enjoy a variety of state statutory procedures to which the administration must adhere when evaluating teachers. In addition, several common law and constitutional law doctrines serve to protect teachers undergoing evaluations.

Litigation in the area of teacher evaluation has developed around issues concerning the processes and procedures used by school districts in conducting evaluations. Even more basic arguments have surrounded the criteria used by school authorities in establishing the evaluation system. This monograph will attempt to describe the problems both teachers and school administrators have had with teacher evaluation. Perhaps an understanding of how those problems were eventually settled by the courts can help guide future practice.

Some basic concepts must be discussed at the outset. First, the evaluation of teachers is not confined to classroom teaching activities. The evaluation of teachers has legally included areas other than teaching. Many of these "ultra teaching" areas could be grouped into a category called *interpersonal and organizational relationships*. Examples of this category include relationships with fellow teachers, cooperation with administration and relationships with parents. The evaluation might even include some consideration of teacher behaviors totally unrelated to the teaching process.

Examples of these areas include assessment of standing in the community, outside employment, or even personal behavior.[1]

The second concept important to the understanding of the law of teacher evaluation is that there are two types of evaluations: formative and summative. *Formative* evaluations are conducted for the purpose of improving teaching. These evaluations often are conducted with the help of such "scientific" approaches as clinical supervision. *Summative* evaluations are conducted primarily for the purpose of developing "a record" which could be used to justify dismissing an unwanted teacher. The summative evaluations inquire whether the teacher is performing at an acceptable level for a teacher "as an employee." For example, does the teacher turn in lesson plans on time? Does the teacher arrive at school on time? Does the teacher use appropriate language? These areas would ask essentially: Is the teacher fit to work?

Interestingly, many school district evaluation forms mix both formative and summative elements within the same rating instrument. This can be problematic. Instead, the formative evaluations should be left to those administrators who are familiar with the improvement of instruction, such as the principal. This approach would free up the principal to be genuinely helpful to the teachers as they grow in professionalism. The summative elements to the teacher's employment can be "checked out" by any number of central office personnel and does not require an intimate knowledge of teaching nor a helpful relationship with the teacher.

Because the summative evaluation is often the basis for negative employment decisions, the law of teacher evaluation concerns issues surrounding this type of evaluation. However, even a formative evaluation can turn summative. If a teacher fails to improve teaching (after a reasonable period and with appropriate help), the "lack of growth" might be the basis of a summative judgment leading to dismissal.[2]

In the final analysis, what is the purpose of a teacher evaluation? Perhaps the Supreme Court of South Dakota said it best: "The purpose of any evaluation is to monitor changes in performance and make improvements where necessary."[3]

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[1] *See* L. Rossow & J. Parkinson, The Law of Teacher Evaluation 1 (1992).

[2] For a thorough treatment of the subject of summative and formative evaluations, see L. Rossow & L. Warner, The Principalship: Dimensions in Instructional Leadership (2000).

[3] Iverson v. Wall Bd. of Educ., 522 N.W.2d 188, 193 (S.D. 1994).

Content of the Evaluation: What May Be Assessed?

Formal Adoption

Before discussing the scope of the evaluation itself, it should be noted that the school district needs to have an evaluation policy. The policy must be written in understandable language and reviewed by the teachers before it is implemented and published. Failure to establish an evaluation policy with clearly defined standards of performance leaves school authorities open to the charge of arbitrary and capricious conduct. The suspicion of arbitrary conduct brings with it the potential judicial conclusion that the administration keeps its evaluation standards hidden in order to discriminate against teachers.

As an example, an Ohio court ruled that the nonrenewal of a tenured teacher was invalid. The board of education had not adopted any criteria for evaluating teachers as a matter of policy. Thus, the board could not dismiss any teacher absent an evaluation policy, which in effect would show the criteria on which to find a teacher deficient in performance.[1]

In a related case, the Texas Supreme Court ruled that the nonrenewal of a teacher/coach was invalid when the local board of education refused to provide a reason for the decision.[2] In the words of the court:

> a decision not to renew a particular teacher's contract is not entirely discretionary, but rather must be predicated on one or more previously established reasons. A decision not predicated on one of the district's preestablished reasons is ineffectual, and the teacher's contract is renewed by operation of law.[3]

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[1] Farmer v. Kelley's Island Bd. of Educ., 594 N.E.2d 204 (Ohio 1992).

[2] Gounds v. Tolar Indep. Sch. Dist., 856 S.W.2d 417 (Tex. 1993).

[3] *Id.* at 418.

Compliance with State Statutes and Regulations

In the decision just discussed, the state had, at the time of the case, statutes which required that school boards develop and adopt criteria for the evaluation of personnel. Therefore, in addition to being arbitrary, the lack of action by the board to establish criteria also violated state statutes. Failure to establish some evaluative criteria presents statutory violations in most states. Over half of the states have enacted laws pertaining to teacher evaluation.

The specificity of the states' evaluation statutes varies widely. Some states require only that local boards adopt some policy, leaving the details to local schools.[4] Other states provide no flexibility and mandate all aspects of the evaluation process by statute. Most states' procedures fall somewhere between, with legislatures taking the opportunity to mandate certain aspects of the process and leaving other aspects to local boards.

In Arkansas, the statute requires that each teacher must be evaluated in writing annually. Once more, if the evaluating administrator believes that certain teacher behaviors could lead to termination, they are required to bring the problems to the attention of the teacher. In addition, the administrator must "assist the teacher to correct whatever appears to be the cause for potential termination or nonrenewal."[5]

The state of Louisiana requires that tenured teachers and administrators (those employed in one school district for more than three consecutive years) be evaluated at least once every three years. Those teachers and administrators not yet having reached tenure are to be evaluated not less than once a year. Interestingly, in those years where the teacher may not be "formally" evaluated, the statutes require that the board of education "informally" evaluate those employees. The statutes goes on to discuss a variety of evaluation elements such as: (1) a job description, (2) a professional growth plan, (3) self-evaluation, (4) observation and conferencing, and (5) classroom visitation.[6]

Where there are no state statutes pertaining to teacher evaluation, the state board of education may require that certain criteria and/or procedures be used. For example, while the statutes of Oklahoma require specific procedures be used in the evaluation of teachers, the state board of education decides on the performance criteria.[7]

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[4] *See, e.g.* IOWA CODE ANN. § 279.14.

[5] ARK. STAT. ANN. 6-17-1504.

[6] LA. REV. STAT. ANN. § 17.3902.

[7] OKLA. STAT., tit. 70 § 6-101.10.

In addition to the state statutes and the state board regulations, the local school board must comply with any negotiated agreement that may exist with the teachers' bargaining representative. The master contract between the board and the teachers' union often contains some provisions concerning teacher evaluation.

When statutes, state board regulations or negotiated agreements specify standards regarding teacher evaluation, the courts have generally held local boards to strict compliance. In *Cox v. York County School District No. 083*,[8] the Supreme Court of Nebraska held that the school district erred when it nonrenewed a probationary music teacher. The Nebraska statute for the evaluation of probationary teachers requires, in part, the following:

> The probationary employee shall have been observed and evaluation shall have been based upon actual classroom observations for an entire instructional period. Should deficiencies be noted in the work performance of any probationary employee, the evaluator shall provide the [employee] at the time of the observation with a list of deficiencies, a list of suggestions for improvement and assistance in overcoming the deficiencies, and follow-up evaluations and assistance when deficiencies remain.[9]

The district argued that although it did not evaluate Cox for a full instructional period during the first semester, the board met and exceeded all of the procedural and due process requirements established by law. Essentially, it argued that the school district *substantially* complied. In the court's view this was insufficient. The court observed that "the end of the semester" was January 14. The observation took place on January 28. While the district was only fourteen days off, the court held to strict compliance, which resulted in a ruling for the teacher.

The teacher had also argued that, contrary to the statute, the supervisor never provided specific guidance as to how to improve in her "relationships with students." Because the basis of the nonrenewal centered on the teacher's lack of good relationships with students, the court held that the statute requires that the teacher be shown how to make this improvement. This was never done.

In Ohio, a probationary ninth-grade English teacher was sent a notice indicating that she would not be reemployed for the following school year. The notice read as follows:

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[8] 560 N.W.2d 138 (Neb. 1997).

[9] *Id.* at 141 citing NEB. REV. STAT. § 79-12,111(2).

> In reviewing the long term needs of the District, it was concluded by the Superintendent and accepted by the Board, that the District would be better served by not offering [you] a continuing contract.[10]

The teacher argued that the district did not comply with the state statute, which requires that "a written statement describing the circumstances that led to the board's intention not to reemploy" be provided to the affected teacher. The Ohio Supreme Court agreed with the teacher. It noted that the statute requires sufficient explanations as to how the board arrived at its decision. What was provided to the teacher was merely conclusory. It left the teacher "groping for answers as to why she was not offered a continuing contract."[11]

It is interesting that a decade ago when the first edition of *The Law of Teacher Evaluation* was written, much of the cases in the area of statutory compliance went to the school district. In other words, when the school district substantially followed the statutes, teachers' arguments for strict compliance were not effective. Perhaps a decade ago, boards were still reacting to an era of unionism and high levels of teacher rights sensitivity. In the first edition of *Teacher Evaluation* the authors noted:

> When local boards have carefully followed evaluation requirements, the courts have held for school authorities. If the stipulated procedures are followed, the courts will be unwilling to substitute their judgment for the judgment of educators when teachers challenge an evaluation rating. In an illustrative case, a Department of Defense teacher had been dismissed for failure to correct cited performance deficiencies. The deficiencies included failure: (1) to maintain a grade book; (2) to develop a written grading system; (3) to submit required course outlines; and (4) to prepare lesson plans which included learning objectives. The teacher claimed that the criteria were invalid because they did not inform him of what was necessary to achieve a satisfactory rating. In holding for the school, the court opined that although the standards did require some subjective evaluation, they were sufficiently objective and

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[10] Naylor v. Cardinal Local Sch. Dist. Bd.of Educ., 630 N.E.2d 725, 727 (Ohio 1994).

[11] *Id.* at 729.

> precise in the sense that most people would understand what was required.[12]

A question remains as to whether an evaluator can admit to being "subjective" in the conduct of the evaluation. One should not confuse being subjective with being arbitrary or abusing discretion. Not only was the evaluator's being "subjective" not the same as being "arbitrary" back in 1987 when *Rogers* was decided, but seems to be true today when the cases are reviewed. The Supreme Court of South Dakota was unwilling to agree with a tenured teacher of twenty years when she argued that her annual evaluation was totally subjective on the part of the principal.

The facts showed that the evaluation policy of the local board included clear language that anticipates that parts of many evaluations must be subjective: *"It is the Board's philosophy that any evaluation, even though it stems from factual evidence, in the final analysis must be subjective"*[13] [emphasis added]. In the final analysis, while evaluation criteria and the approach to obtaining the information must be objective, the fact that some human being fills out the forms and must make some judgments about what is observed (thus subjective) does not render the evaluation invalid.

Content and Constitutional Requirements

Avoiding Vagueness

In order for the content of an evaluation to withstand a constitutional challenge that it is void for vagueness or irrelevancy, there are several conditions that should be met. First, the criteria used in the evaluation should be rationally related to state objectives. Second, the administration should be able to show how each criterion is related to the job of teaching.

While objective criteria in the evaluation are more easily defended, subjective factors may be included as previously noted. An example of an objective criterion is: *teacher started class on time.* A subjective criterion is: *teacher used clear explanations.* The use of the objective criterion merely requires that the evaluator check the clock as the class begin. The subjective criterion requires discretionary judgment. What may be a clear explanation to one evaluator may not be to another. However, what is important is not whether

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[12] Rogers v. Dep't of Defense Dependents Sch., Germany Region, 814 F.2d 1549, 1551 (Fed. Cir. 1987).

[13] *See supra* note 3.

the criterion is objective or subjective but whether the behavior is validly related to the requirements of the job and can be observed.

Avoiding Free Speech Violations

Constitutional Doctrines

A school district may not base a negative employment decision on the teacher's exercise of free speech rights. As far back as 1968, the United States Supreme Court in *Pickering v. Board of Education* ruled that teachers have the right to air their views on *matters of public concern*.[14] The Court noted that there was no justification for limiting teachers' contribution to public debate. The Court viewed the role of teachers as providing a special vantage point from which to formulate an informed opinion on school issues.[15]

In the case itself, Marvin Pickering, a public school teacher in Will County, Illinois, was terminated some time after he wrote a letter to the local newspaper criticizing the board of education. Specifically, Mr. Pickering disagreed with the board's disparate expenditure of funds between the educational and athletic programs. The board claimed that the letter contained false statements damaging the reputations of the board members and school administrators. In using the balancing-of-interests approach in analyzing the case, the Court asked: (1) was the substance of the letter a matter of public concern? and (2) did the letter actually produce disruption in the school system? The Court concluded that the letter was a matter of public concern. Also, the record revealed that the letter did not precipitate any disruption in the system. In determining the lack of disruption, the Court noted that the letter was not directed at anyone with whom Pickering would have daily contact in the work environments. Given its analysis, the Court concluded that "absent proof of false statements, knowingly or recklessly made, a teacher's views on public issues cannot form the basis for dismissal."

In *Mt. Healthy City Board of Education v. Doyle,* a nontenured teacher telephoned a radio station to criticize a dress code for teachers. The teacher, Doyle, had previously been involved in altercations of a reprimanding nature. The altercations included: arguing with school cafeteria employees about the amount of spaghetti which had been served him, referring to students in connection with a disciplinary complaint as "sons of bitches," and making an obscene gesture to two girls in connection with their failure to obey com-

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[14] 391 U.S. 563 (1968).

[15] *Id.* at 572.

mands made in his capacity as cafeteria supervisor. Doyle challenged his dismissal as an impermissible curtailment of his right to free speech. In addition to the *Pickering* standards, the Court asked whether the teacher could show that his free speech was a substantial factor in the board's decision to terminate him. A positive answer then triggers the need for the authorities to show by a preponderance of evidence that the board would have reached the same decision to terminate absent the protected speech. While Doyle had initially retained his job under *Pickering*, the application of the new standard effectively reversed. The decision of the board to dismiss Doyle was ultimately upheld.[16]

In 1983, the United States Supreme Court added to the *Pickering* and *Mt. Healthy* standards when it decided *Connick v. Myers,* a noneducation case.[17] In *Connick*, Sheila Myers, an assistant district attorney, objected to being transferred to another section of the office. As a consequence, she developed a questionnaire to be completed by her coworkers. The questionnaire asked questions which in part called into question the authority of the district attorney. She passed out the questionnaire at the office. Upon learning of the questionnaire distribution, the district attorney dismissed Ms. Myers for insubordination. In analyzing the issue of whether Ms. Myers was protected by the Free Speech Clause for her activities, the Court for the first time applied a means of "evaluating" the quality of the speech against the employer's need to operate an efficient workplace. The Court noted that Myers' speech must be viewed in relation to content, form, and context. Unlike the approach used in *Pickering* where the teacher's speech was taken "as is" as long as it was of the public concern type, here the Court can consider the nature of the employee's speech. For content, the Court noted that thirteen of the fourteen questions on the questionnaire had to do with her own personal issues. This would rank the speech low on the spectrum of public concern. The more issues dealing with board social policy considerations, the higher the Court would have considered the content. As for form, the method of the questionnaire is not as high as it might have been had she spoken out at a meeting or perhaps spoken with each coworker face-to-face. The questionnaire was a somewhat pretextual approach to dealing with the subject. In other words, it was not the most honest way to express the speech. Therefore, her marks are also low in terms of the form of the speech. Lastly, the context of the speech was low because the speech was given during the workday and at the workplace. If the speech activity would have occurred before or after work, during

[16] 429 U.S. 274 (1977).
[17] 461 U.S. 138 (1983).

the lunch hour, or—better yet—if the questionnaire would have been mailed to the homes of her coworkers, the context criterion would have been higher.[18]

The triad of *Pickering*, *Mt. Healthy*, and *Connick* continues to be the backbone of jurisprudence in the area of teacher speech. However, the application of these standards can take interesting turns when the most recent U.S. Supreme Court case is considered in the area of public employee speech.

In *Waters v. Churchill*, the Court was asked to consider whether the dismissal of a public hospital nurse violated her speech rights.[19] The nurse was dismissed for insubordination when it was learned that she spoke negatively about the hospital's internal transfer policy. The facts showed that Cheryl Waters was fired for allegedly making statements to a coworker during a work break. What Waters actual said during the conversation is in dispute. The employer's version was based on interviews with the coworker and one other employee who overheard part of the conversation. The witnesses indicated that Waters made disruptive statements critical of her department and of the administration. Waters' version, which was corroborated by others who also overheard part of the conversation, indicated that her speech was largely limited to nondisruptive statements critical of the hospital's cross-training policy, which she believed threatened patient care.

The United States District Court for the Central District of Illinois granted summary judgment in favor of the hospital, holding that management could fire Waters with impunity because neither version of the conversation was protected under *Connick*. The Court of Appeals for the Seventh Circuit reversed, concluding that Waters' speech, viewed in the light most favorable to her, was on a matter of public concern and was not disruptive. The inquiry must turn on what her speech actually was, as determined by a jury—not on what the employer thought it was.

In vacating the decision of the Seventh Circuit, the Court held that the *Connick* test should be applied to what the government employer reasonably thought was said, not to what the trier of fact ultimately determines to have been said. It noted that the Seventh Circuit's approach would require the government employer to come to its factual conclusions through procedures identical with the rules of evidence used by the courts. Employment decisions are often made on hearsay, past conduct, personal knowledge, and other factors that the courts ignore.

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[18] *Id.*

[19] 511 U.S. 661 (1994).

On the other hand, the Court noted that the *Connick* test cannot be only applied to the facts as the employer thought them to be without considering the *reasonableness* of the employer's conclusions. It is necessary that the employer reach conclusions about what was said in *good faith* rather than as a pretext. As a practical guide to public employers, the Court summarized it this way:

> Thus, if an employment action is based on what an employee supposedly said, and a reasonable supervisor would recognize that there is a substantial likelihood that what was actually said was protected, the First Amendment requires that the manager proceed with the care that a reasonable manager would use before making an employment decision of the sort involved in the particular case. In situations in which reasonable employers would disagree about who is to be believed, or how much investigation needs to be done, or how much evidence is needed to come to a particular conclusion, many different courses of action will necessarily be reasonable, and only procedures outside the range of what a reasonable manager would use may be condemned as unreasonable.[20]

The Court indicated that it might be unreasonable for an employer to come to a conclusion with no evidence at all. Likewise, it would be unreasonable for the employer to act based on extremely weak evidence when strong evidence is clearly available. For example, if an employee is accused of writing an improper letter to the editor, the employer should be expected to read the letter rather than deciding on hearsay.

In applying the procedural standard set above, the Court found that Waters' speech discouraged people from coming to the obstetrics department. This qualifies as disruption. Waters argued that much of what she said was not disruptive. The employer ignored those parts. The Court noted that as long as the *Connick* test was applied to the speech for which Waters was fired, it is irrelevant that the employer did not take into consideration other speech at the event.

It should be noted that whether free speech is expressed in public or private settings, teachers are protected by the First Amendment. The Supreme Court, in *Givhan v. Western Line Consolidated School District*, announced this standard.[21] Bessie Givhan, a junior

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[20] *Id.* at 1889-1890.

[21] 439 U.S. 410 (1979).

high English teacher, met privately with her principal in order that she might criticize school policies on race discrimination. The principal alleged that Givhan was insulting, loud, and arrogant in manner during their meeting, and she was therefore terminated for insubordination. In holding for the teacher, the Court refused to recognize a lesser degree of protection for speech because the communication was in private.

To summarize the discussion of free-speech rights for teachers, it should be remembered that:

(1) a teacher might not be punished (dismissed, transferred to a less desirable position, or demoted) for engaging in free speech;

(2) it can be assumed that the teacher is protected unless some conditions exist that cancel the teacher's protection. Even if the behavior of the teacher is protected speech, the teacher can be punished anyway if a good faith, reasonable investigation has been conducted and concludes that the behavior was not protected speech. A teacher may not be protected if the speech is purely personal in nature and interferes with the smooth running of the school; or

(3) the employee would have been dismissed for already existing, legitimate reasons. It should be noted that the principles governing the protection of teachers in the free speech area apply to other fundamental freedoms, including the freedom of association and the right of redress of grievance.

Applying the Teacher Speech Doctrines: Criticism of Authority

Given the constitutional doctrines for teacher speech discussed in the previous section, it is helpful to look at how the lower courts have applied these doctrines in deciding recent issues. It is not uncommon for teachers to criticize their principals or other supervisors from time to time. Criticism of legitimate authority can be risky for the teacher. At what point does *criticism* spill over into *insubordination*? The next section will explore the contours of insubordination. For now, it is important to look at those occasions when teachers have been protected and when they have not. The speech clause seems to offer no protection as long as the employer has conducted a good faith (no pretext) reasonable investigation prior to the termination. Of course, the employer must conclude that there is no protected speech being used as the basis of the termination. The employer will be held harmless for a "wrong" conclusion.

The Ninth Circuit decided that a public junior college teacher's dismissal based on the discovery of anonymous letters should be upheld. In *Wasson v. Sonoma County Junior College*,[22] a series of letters were disseminated throughout the district. The letters accused the administration of various types of misconduct. The board hired a private investigator to determine the origin of the letters. An instructor, Wasson, was identified as the author of the letters. She was dismissed for having authored the letters which, according to the board, contained statements about the superintendent that "are false and defamatory and which had the purpose or effect of undermining his leadership of the district."[23]

The teacher's argument was that the dismissal amounted to "free speech retaliation" that was imputed wrongfully to her authorship. Interestingly, the court ruled that:

> A First Amendment retaliation claim seeks to vindicate a public employee's exercise of free speech rights when she has suffered an adverse employment action in response to having spoken out publicly. It cannot be used to remedy a cause of mistaken identity. In fact, the Supreme Court has never held that it is a violation of the Constitution for a government employer to discharge an employee based on substantively incorrect information.[24]

In *Wales v. Board of Education of Community Unit School District 300*,[25] the Seventh Circuit decided that a memo sent to the principal of the school where the teacher worked was not protected speech. Therefore, the following dismissal, which was in part based on the memo, was valid. The teacher in this case, Colleen Wales, objected to the management approach being used by the principal. She felt there was insufficient support being provided for disciplining students. The annual evaluation taken of Wales some months after the memo reflected a concern that the principal had for continued positive relationships with the teacher. The memo produced a deteriorating effect on the relationship. The court said, "an employee's decision to deliver a message in private supports an inference that the real concern is the employment relation—and a school district as employer may react to speech about the workplace in ways a government as regulator may not."[26]

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[22] 203 F.3d 659 (9th Cir. 2000).

[23] *Id.* at 662.

[24] *Id.* at 663.

[25] 120 F.3d 82 (7th Cir. 1997).

[26] *Id.* at 84. *See also* Cliff v. Indianapolis Bd. of Sch. Comm'rs, 42 F.3d 403 (7th Cir. 1994).

Apparently, a public employee may not even be protected by *not* speaking. In *Coover v. Saucon Valley School District*,[27] the federal district court ruled that a school district could dismiss a superintendent for unprofessional conduct when she remained silent during a presentation of a politically controversial speaker. The school district had a policy which prohibited "using school time or property for political purposes."[28] The superintendent invited the political speaker to address the district's administrators. During the presentation, the superintendent remained silent. The board concluded that the superintendent's silence sent a message to district employees that a degree of agreement may exist between the superintendent and the speaker. At trial, the superintendent's primary argument was that her silence was protected speech. In rejecting the superintendent's argument, the court noted that in order for her speech to be protected, she would have needed to meet the threshold requirement of *Pickering*. That is, she would have needed to be speaking (or in this case not speaking) as a citizen on a matter of public concern. However, she was present for the speech event as an employee, not a citizen.[29]

With the post-*Waters* line of cases, it is difficult not to conclude that the pendulum of teachers' speech rights versus employer authority to dismiss has shifted in favor of school authorities. Even if the teacher engages in protected speech, if the administration does not think so after it conducts a good faith, reasonable investigation than the teacher is not protected. Nevertheless, one example is available of an employee successfully defending herself from a dismissal based on speech.

Norma Kirchmann was a secretary at a school district facilities department. Noticing that there were some irregularities in the bidding process for architectural services, she investigated. Kirchmann discovered that the architect selected by the administration had a conflict of interest with officials in the district. She decided to fax an anonymous letter to those firms that were not selected, telling them of the conflict of interest and suggested bias in the selection process. Upon discovery of the faxing activity of Kirchmann, the district notified her that she was suspended, without pay, for thirty days. The notice charged her with "failure to follow directions of a superior, dishonesty, and misuse or misappropriation of District property."[30] The charge of failing to follow directions was based on

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[27] 955 F. Supp. 392 (E.D. Penn. 1997).

[28] *Id.* at 395.

[29] *Id.* at 400.

[30] Kirchmann v. Lake Elsinore Unified Sch. Dist., 67 Cal. Rptr. 2d 268, 272 (Ct. App. 1997).

Kirchmann's transmission of the fax after having been told by the assistant superintendent that any communication with outside vendors had to be approved by the administration. The charges of dishonesty and misuse of district property were based on her unauthorized use of the list of bidders.

The lower court denied relief, concluding that the district's interest in promoting efficiency of its operations outweighed Kirchmann's free speech interest. In California, a court of appeals reversed. The secretary argued that the district used the faxing event as an excuse to dismiss her and that there was no objective job-related reason for the dismissal. The district argued that she did not engage in protected speech. It averred that the purpose of the fax was to seek revenge against the administration and that she had no interest in facilitating public discussion.

It is interesting that the appellate court relied on a Seventh Circuit decision when it opined:

> It is often the case that those who speak out are also involved in personal disputes with employers and other employees. Consequently, a plaintiff's speech could be characterized as a matter of public concern even if the speaker stands to gain a personal benefit in addition to bringing the wrongdoing to light. [However] An employee's personal motive may vitiate the public concern element if the speech concerns a subject of public interest but the *expression* addresses only the personal effect upon the employee.[31]

The court's ruling was based on the conclusion that the seriousness of the subject of the secretary's fax (conflict of interest and bias in the bidding process) was not outweighed by the district's need for efficiency. There was no evidence of any of the *Pickering* or *Connick* employer concerns. Perhaps most important, the administration did not show that it conducted a "good faith, reasonable investigation" before it concluded that there was no protected speech.

Student Progress as an Evaluation Criterion

As early as 1973, the courts considered whether using student test scores to evaluate teachers was a violation of due process.[32] In a seminal case, an Iowa teacher's contract was not renewed because

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[31] *Id.* at 274 (quoting Marshall v. Porter County Plan Comm'n 32 F.3d 1215, 1219 (7th Cir. 1994).

[32] Scheelhaase v. Woodbury Cent. Cmty. Sch. Dist. 488 F.2d 237 (8th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974).

the administration found no improvement in the achievement test scores of her students. The teacher asserted that the use of student test scores had no support in educational theory. Therefore, applying a student achievement standard denied her substantive due process. In addition, the teacher claimed that the school administration failed to interpret the tests properly and that her students actually showed normal progress. The school district defended its use of student test scores as a valid and reasonable exercise of discretion.

The trial court found for the teacher. It held that a teacher's professional competence could not be determined solely on the basis of her students' achievement scores, especially where the students maintain normal educational growth rates. However, the United States Court of Appeals for the Eighth Circuit reversed. In his concurring opinion, Judge Bright concluded that a board of education might rely on whatever expert opinion it wishes to make its educational decisions. In this case it suggested that the opinions of the superintendent that "these test results reflected adversely upon the teaching competence of Mrs. Scheelhaase, may have been erroneous but the conclusion was not an unreasoned one."[33] The court further concluded that the decision to terminate could not be faulted as arbitrary and capricious. A board's mere mistake in judgment or in weighing the evidence did not demonstrate any violation of substantive due process.

Likewise, school authorities have been successful in using student achievement scores in related contexts when evaluating teachers. The St. Louis Public Schools recently adopted the policy of using scores from the California Achievement Test as part of its annual evaluation of teachers. As a result, certain teachers were denied salary advancement and placed on probation because of low CAT scores of the students assigned to them. Suing in the federal district court, the teachers argued that the CAT was not designed for use as, and has not been validated for use as, a teacher evaluation tool. Furthermore, the school district used students' CAT scores to evaluate only English and mathematics teachers. The teachers asserted that this procedure created a classification among teachers which is arbitrary and capricious.[34] Ruling for the school board, the court applied a rational basis test to the policy. It noted that the "plaintiffs can prove no set of facts which would show the defendants' classification is irrational."[35]

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[33] *Id.* at 245.

[34] St. Louis Teachers Union, Local 420 v. St. Louis Bd. of Educ. 652 F. Supp. 425, 428 (E.D. Mo. 1987).

[35] *Id.* at 425.

Bringing the jurisprudence up to date, there appears to be little change in the position of the courts regarding the use of student test scores to evaluate teachers' performance. In 1998, the Court of Appeals of Indiana ruled that the Indianapolis City Schools did not violate a state statute when it required all schools take student achievement scores into consideration when evaluating teachers. The state legislature in Indiana observed that the Indianapolis schools were achieving at a rate lower than other schools. Consequently, it passed legislation that would require the city board to develop policies to improve student achievement. The Indianapolis teachers' union interpreted the resulting policy as requiring that teachers "be evaluated solely on student achievement on the Indiana Statewide Testing for Educational Progress assessment tests."[36] The court found that the legislature had intended for the city board to have latitude in the development of the policy. The fact that the policy did include student achievement as a means of evaluating teacher performance did not preclude the use of "other objective standards." The use of student test scores is a valid approach to teacher evaluation because it is objective.

[36] Indiana State Teachers Ass'n v. Bd. of Sch. Comm'rs of Indianapolis, 693 N.E. 2d 972, 975 (Ind. 1998).

The Role of Evaluation in the Termination Process

State statutes frequently require that a teacher's performance be evaluated before the district terminates the contract. The number of annual evaluations conducted varies but usually are more frequent for probationary teachers than for tenured teachers. When not renewing or terminating teachers' contracts, statutes typically require that only certain grounds serve as bases for termination. Often the statutes identify "grounds" to be used when terminating tenured teachers but refer to "reasons" for dismissing probationary teachers.[1] The difference between grounds and reasons is largely one of specificity. Grounds are statutorily stipulated and consist of three of four areas of deficiency. Reasons could be anything the local board of education feels accurately describes the basis for the termination. However, the reasons should be rationally related to a legitimate objective of the board in retaining qualified teachers.

The focus of this section is the use of the commonly recognized statutory grounds for terminating teachers and the part these grounds play in evaluation. It should be noted that local boards may also use statutory grounds as reasons for terminating nontenured teachers. The most typical statutory grounds are incompetence, immorality, insubordination, and other just causes.

In order to show that a teacher has violated one of these grounds, school authorities must have proof. Therefore, the question becomes what kind or level of evidence is sufficient. While proving each of the grounds is different, there are some general principles that can be followed.

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[1] *See supra* note 7-10.

Sufficiency of Evidence and the Deference Given Boards

Local boards of education have considerable discretionary power in assembling evidence. The board's assessment of the facts to determine whether there are grounds or reasons for terminating teachers' contracts in most cases will be accepted by a reviewing court. For example, a Maryland court ruled that a dismissal of several teachers for the city of Baltimore should not be overturned. The two teachers in question had been put on a "needs improvement" plan as a result of their annual evaluation. When the teachers, according to the evaluating administrator, failed to improve, they were recommended for dismissal. As a result of the dismissal, an appeal was taken by the state board. The state board upheld the dismissal, even though the teachers showed that the precise evaluation procedures were not followed. In affirming the decision of the state board, the court held that a court will not revise a decision of the agency unless there is *substantial evidence* that the agency erred:

> Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. In applying the substantial evidence test, a court is not to substitute its judgment for the expertise of an agency, rather the test is a deferential one requiring restrained and disciplined judicial judgment so as not to interfere with the factual conclusions. This deference applies not only to the agency's fact-finding, but to the drawing of inferences from the facts as well.[2]

The court then went on to say "as long as the agency's (board of education) decision is not predicated solely on an error of law, a reviewing court will not overturn it if a reasoning mind could reasonably have reached the conclusion reached by the board. This means, of course, that the Board's authority ... is not unlimited. The board cannot finally decide pure questions of law."[3]

Incompetence

Perhaps more than any other charge used for dismissal, removing a teacher for incompetence requires that repeated evalua-

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[2] Board of Sch. Comm'rs of Baltimore City v. Davis, 625 A.2d 361, 370 (Md. 1993).

[3] *Id.*

tions clearly show unremediated deficiencies. The establishment of incompetence rarely rests on a single incident. *American Law Reports* concludes that the courts' view of teacher incompetence is driving the multiple deficiencies requirement:

> the incompetent teacher is rarely deficient in one respect alone; rather, incompetence seems to manifest itself in a pervasive pattern encompassing a multitude of sins and bringing in its wake disorganization, disharmony, and an atmosphere unproductive for the acquisition of knowledge or any other ancillary benefit.[4]

Compared to other grounds that are used to terminate teachers, incompetence is the most time-consuming and demanding of documentation. Nevertheless, it remains one of the most often-used grounds for removing teachers. Incompetence is the deficiency most related to the teaching process. When a board of education attempts to carry out its goal of retaining "good teachers," removing those that are incompetent seems to follow. While incompetence can consist of a number of different deficiencies, the areas found to be most recently litigated include student control problems and instructional failures.

A February 2003 news account of teacher dismissals in Pennsylvania show that most instances of teachers who lost their teaching licenses were based on sex-related offenses or other crimes. In the decade of the '90s there were only eleven teachers whose licenses were revoked because of incompetence. One of Pennsylvania's principal's has noted: "Incompetence is probably the most difficult issue to prove when trying to remove a teacher's license. A really good lawyer could probably show that, just because a teacher got an unsatisfactory review, it was just a snapshot in time and might not reflect the teacher's overall performance."[5]

Regardless of the difficulty in dismissing on grounds of incompetence, an increase in the knowledge of the laws of teacher evaluation can help the administrator ward off discouragement.

While lack of classroom control is one of the major problems leading to nonrenewal of the probationary teachers' contracts, the dismissals that have most often produced litigation are those of tenured teachers. In a majority of recent court cases, school districts have been successful against challenges from teachers.

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[4] 4 A.L.R. 3d 1090 at 1102.

[5] Jane Elizabeth, *A Question of Quality: Paperwork and legal threats discourage teacher firings*, Pittsburgh Post-Gazette, Feb. 6, 2003, at A1, http://www.post-gazette.com/localnews/20030206firingrp2.asp.

In *Tippecanoe Education Association v. Tippecanoe School Corporation*[6] an Indiana teacher of two years was evaluated a number of times during her probation. The particular evaluations, which led eventually to litigation, noted that she was having "classroom management" problems. After reading the evaluation, the teacher concluded that the principal had not used the terms as listed in the collective bargaining agreement to indicate the area in need of improvement. Therefore, she argued, the evaluation was invalid. She filed a grievance under the terms of the collective bargaining agreement. Specifically, the principal used "descriptors" instead of referencing standards. For example, the principal noted a deficiency in Standard 1: "The teacher utilizes positive classroom management."

In his "Evaluator's Comments" he noted: "Improvement is needed in establishing parameters for student behavior, managing disruptive behavior constructively and using rules/routine at developmental levels."[7] In rejecting the teacher's claim, the court ruled that the evaluator "accurately and succinctly describes the specific performance behavior. It is therefore sufficient as a matter of law."[8]

In *Johnson v. Francis Howell R-3 Board of Education*,[9] a Missouri tenured teacher was dismissed for incompetency. After ten years of teaching, Barbara Johnson, a fourth- and fifth-grade teacher was alleged to have problems with "maintaining classroom discipline." She was put on a plan of improvement. The district provided videotaped lessons, professional material to read, interaction with other teachers and role-playing opportunities. All these resources were intended to help Johnson get off her plan of improvement. According to the administration, she made little or no progress in removing her deficiencies. In the letter notifying her of the board's intent not to renew her contract, thirty-eight documented incidents were cited.

At trial, the court ruled in favor of the district. On appeal, the teacher argued in part that the board erred because her deficits did not amount to incompetence. She asserted that the board failed to use a valid understanding of incompetence. Further, the approach used by the administration in dismissing her for incompetence promotes arbitrary dismissals. In affirming the decision of the lower court, the appeals court identified several definitions of "incompetence."

The appeals court began by looking at *Black's Law Dictionary*, which states that, "In order to establish a charge of incompetency,

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[6] 700 N.E.2d 241 (Ind. 1998).

[7] *Id.* at 244.

[8] *Id.*

[9] 868 S.W.2d 191 (Mo. 1994).

inefficiency, the [Board] had to demonstrate a lack of ability, legal qualification or fitness to discharge the required duty.'"[10] It went on to cite some of its own precedents: "We addressed the standard for terminating a permanent teacher for incompetency stating: Incompetency is defined as the inability to perform professional teaching duties in a manner acceptable to the Board."[11] The court also cited to *Birdwell v. Hazelwood School District*, stating:

> Thus, incompetency is directly related to unsatisfactory work. Such work is that which is performed in an effort to comply with one's duties as a teacher ... in a manner acceptable to the Board but which fails.[12]

In *McKenzie v. Webster Parish School Board*,[13] a teacher with classroom control problems was nonrenewed in the spring of his third year of teaching. At trial, the court granted a summary judgment for the school district. On appeal, the teacher argued that the district did not follow the state statute. The statute required that the district provide written documentation for the valid reasons for the dismissal. In the case of Gerald McKenzie, a number of evaluating administrators had noticed his lack of student control. While the teacher's performance was satisfactory in other areas, the classroom management deficiency played the primary role in the dismissal. The teacher argued that the dismissal was based on "trumped up" reasons. According to McKenzie, there were many other teachers with control problems that were treated differently. McKenzie advanced the theory that the "School Board devised a scheme to fire him in order to make a coaching position available for the relative of a parish elected official who was hired over two other more qualified applicants."[14]

Nevertheless, the district did not think it had to comply with the state statute regarding "written documentation" because McKenzie was a probationary teacher. Even though there was ample testimony from multiple observers attesting to the teachers' control problem, the court applied the statute as requiring strict compliance. The requirement of written documentation applies to both tenured and nontenured teachers. Therefore, the court reversed the summary judgment and the teacher was reinstated.

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[10] Black's Law Dictionary 960 (Rev. 4th ed. 1968).

[11] 868 S.W.2d at 197.

[12] *Id.* at 198 (citing Birdwell v. Hazelwood Sch. Dist., 352 F. Supp. 613 (E.D. Mo. 1972), aff'd, 491 F.2d 490 (8th Cir. 1974).

[13] 609 So. 2d 1028 (La. Ct. App. 1992).

[14] *Id.* at 1030.

A Florida probationary teacher was dismissed during the school year for "misconduct in office." The teacher, Daniel Walker, was involved in a major classroom control event. The evidence presented demonstrated that Walker's class, consisting of twenty-six students, was out of control.[15] On that particular day, two students were away from the class to report a theft. Two others were out of the class being searched for stolen property. One student was so intoxicated that it required two adult staff members to carry him from the classroom. Two other students were attempting to hide contraband in the darkroom. One student hid a look-alike drug in the trashcan, and another student testified that everyone in the class was going to the bathroom. No lesson was presented.

Walker argued that under *McNeill v. Pinellas*[16] the superintendent was required to present proof not only of misconduct in office, but was also required to present proof of the resulting ineffectiveness in the school system. The teacher maintained that although the record contains proof of his misconduct in office, there is no evidence that the misconduct was so serious as to impair his effectiveness in the system. In rejecting Walker's argument, the court concluded that the teacher's ineffectiveness in the school system might be *inferred*.[17] The court distinguished the *Walker* case from *McNeill*, where the teacher's conduct was of a private immoral nature. In such a case, the teacher's ineffectiveness cannot be inferred due to the private nature of the misconduct. By contrast, the misconduct here occurred in the classroom. The very existence of the described chaos in Walker's classroom speaks for itself. The teacher's misconduct, which consisted of his unwillingness to follow established school board policy, led to a loss of control in the classroom which, by its very nature, demonstrates his ineffectiveness in the school system. In such a case, independent evidence of the teacher's ineffectiveness would be superfluous.[18]

In *Unified School District v. Hubbard*,[19] a Kansas tenured teacher was terminated for lack of classroom control. The board, after watching a videotape made by some of his art class students, decided to terminate his contract because of the activities shown on the videotape. The board claimed the videotape showed his lack of classroom control and his failure to intervene and stop a female from being sexually harassed by two male students. After the decision to terminate, the teacher appealed the decision to a state statu-

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[15] Walker v. Highlands County Sch. Bd., 752 So. 2d 127 (Fla. Ct. App. 2000).

[16] 678 So. 2d 476 (Fla. Dist. Ct. App. 1996).

[17] 752 So. 2d at 128.

[18] *Id.*

[19] 868 P.2d 1240 (Kan. Ct. App. 1994).

torily authorized hearing committee. The committee reversed the decision of the board, ruling that there was insufficient "good cause" to terminate. The district appealed. Citing the Kansas statute defining good cause, the court noted:

> A tenured teacher may be terminated or nonrenewed only if good cause is shown, including any ground which is put forward by the school board in good faith and which is not arbitrary, irrational, unreasonable, or irrelevant to the school board's task of building up and maintaining an efficient school system.[20]

In affirming the decision of the committee (to reinstate the teacher), the court noted that it reviewed the sexual harassment policy of the district and determined the isolated events depicted on the videotape did not warrant termination. Specifically, under its findings of fact the court noted that the committee found that:

> While this panel finds the second part of the skit offensive, and in no way condones the temporary lack of discipline on Mr. Hubbard's behalf, ... we do not find that the activities placed any student in a "hostile" environment, or find that the activities were raised to a level, which constitutes sexual harassment.[21]

Nevertheless, the board also argued that Hubbard should be terminated because of an overall lack of ability at classroom control. It argued that the committee ignored the board's standards of teacher conduct and adopted a different standard for teacher conduct during classroom and free time. Hubbard testified that during free time students are allowed to be more relaxed in their behavior and are not strictly required to follow his classroom rules of conduct. During the ten-minute free time period that is the subject of the court case, Hubbard permitted the students to talk to each other, to move around the classroom, to say goodbye to a fellow classmate who was moving out of the school district, and to videotape a skit using that student as one of the participants. However, the district policy required the teacher to maintain control at "all times." Strictly speaking, Hubbard was in violation of the policy. The court indicated that the policy violation was a one-time event and did not amount to lack of control.

In the final analysis the court ruled that: "The activities on the tape were isolated and were not reflective of Hubbard's teaching

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[20] *Id.* at 1243 (citing Gillett v. U.S.D. No. 276, 605 P.2d 105 (Kan. Ct. App. 1980)).

[21] *Id.*

ability. From the entire record ... Mr. Hubbard's classroom discipline does not suffer from a general lack of control and the tape was a brief, isolated event." Therefore, the Board's evidence failed to establish good cause to terminate him.[22]

Therefore, it would appear that incompetency is whatever the district says it is as long as there is an objective way of having measured the deficiencies. A period of remediation with the administration providing resources to help the teacher also appears necessary. A word of caution for administrators: when teachers have been successful in defending against charges of incompetence it has been due to the teacher's long-standing record. In other words, once a teacher has established him or herself by a series of adequate annual evaluations, it may be difficult to show that one particular "bad" evaluation is not an aberration. It appears as thought the courts are willing to take the larger picture into consideration. In other words, before the administration ends a teacher's career, it likely needs to see some pattern and reasonable forecast that the teacher's previous good record has now taken a turn for the worse and is not likely to turn around.

Fortunately for school administrators, dismissing a teacher can be based on grounds other than incompetence. Indeed, other deficit areas are not as difficult to prove as incompetence. Teacher immorality is one of those dismissal bases that are most often decided for the district. Let us now take a closer look.

Immorality

Immorality continues to be an often-used ground for teacher termination. Determining that a teacher has not met the standard for moral fitness is a subject for the evaluation process. While immorality would be difficult to connect to actual in-class performance, its detection is no less significant. Typically, moral unfitness is a judgment call by the school board. The need to make a decision about a teacher's moral fitness is thrust upon the board by events "reported" by the administration, students, or the public. While the moral fitness components of an evaluation are not subject to precise measurement, it does become part of the overall summative evaluation. The United States Supreme Court has recognized the importance of local authorities considering moral fitness of teachers.[23] The more difficult questions are: how is immorality defined

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[22] *Id.* at 1244.

[23] *See* Board of Educ. v. Pico, 45 . U.S. 853 (1982).

and what teacher behaviors have courts considered to be within this definition? The preponderance of cases in the last decade involving termination on grounds of immorality has been won by the school districts. Immorality is a broad category which is manifested in several forms, including sexual misconduct (also commonly referred to as *moral turpitude*). State statutes tend to include *dishonesty* as a manifestation of immorality. Later in this section the specific misbehaviors of teachers who were terminated for dishonesty will be recalled from an earlier decade. Most recently the courts have considered potential immoral behavior such as drug possession, acts of violence, lewd speech, and traffic violations.

The Missouri Court of Appeals advanced a fairly good definition of teacher immorality in stating that:

> Immoral conduct [is] contemplated behavior sufficiently contrary to justice, honesty, modesty or good morals, or involving baseness, vileness or depravity so as to support the inference that the teachers understand the conduct to be wrong.[24]

Drug possession

As in most states, Connecticut has a statute that permits school boards to terminate teachers for "moral misconduct."[25] In *Gedney v. Board of Education of Groton*,[26] a tenured fourth-grade teacher was terminated when the board discovered that he had been arrested for possession of cocaine. In Connecticut, cocaine possession is a felony. The teacher, Ronald Gedney, was also charged with possession of drug paraphernalia, a misdemeanor. He was granted accelerated rehabilitation and, thus, was never convicted. Regardless, the board terminated Mr. Gedney. In providing the teacher with moral misconduct as the grounds for his dismissal, the board wrote, " your actions seriously compromised your effectiveness as a role model and employee of the Groton Board of Education."[27] At trial, the teacher argued that he was protection by Section 504 of the Rehabilitation Act of 1973.[28] Having had a previous drug addiction, he asserted that the board terminated him because of his dis-

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[24] Youngman v. Doerhoff, 890 S.W.2d 330, 341 (1994).

[25] Conn. Gen. Stat. § 10-151(d) (1997).

[26] 703 A.2d 804 (1979).

[27] *Id.* at 805.

[28] 29 U.S.C. § 794.

ability (being a former addict). The court rejected the argument. Also raised on appeal was the argument that he was dismissed contrary to what section 504 would allow. In affirming the decision of the lower court, it was noted that the board did not base its termination decision on drug possession. Rather, the board terminated him because of the criminal activity surrounding the possession. The record showed that the board did notify the teacher that "Such behavior must necessarily have undermined your capacity to effectively work ... with fellow staff members, sets an extremely poor example for students and staff and reflects personal values inconsistent with continued employment as a teacher."[29]

Criminal activity

While not yet convicted, in *Thomas v. Board of Education of Cape Girardeau School District No. 63*, a Missouri teacher was terminated for immorality due to her being charged in a shooting incident.[30] The teacher had taught ninth-grade English in Cape Girardeau for nearly twenty years with an exemplary teaching record. However, she was married and living apart from her husband. Upon discovery that her husband was having an affair with another woman, she drove to her husband's home for a confrontation. The teacher and "the other woman" did face each other with an exchange of harsh words. Before her husband's girlfriend could drive off, the teacher shot at the car with a Smith and Wesson .357 caliber revolver. The first bullet went through the car door and entered the girlfriend's lower right leg. The woman managed to speed away while the teacher continued to fire at her car. All in all, four shots were fired with three bullets actually hitting the car, including the bullet that injured the driver.

As a result of the teacher's termination, a suit was filed in state court. At trial, the court ruled for the district. On appeal, the teacher argued that the board improperly defined immoral conduct and that the evidence presented was insufficient to show a nexus between her conduct and performance of her duties. In rejecting the teacher's argument, the court noted that a definition of immoral conduct must include a consideration for "that conduct which renders a teacher unfit for the performance of her duties."[31] That the conduct renders the teacher unfit to teach is a limitation, not a definition of immoral conduct. The teacher had also argued that

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[29] 703 A.2d at 807.

[30] 926 S.W. 2d 163 (1996).

[31] *Id.* at 166 (citing Ross v. Robb, 662 S.W. 2d 257, 259 (Mo. banc. 1983)).

immoral conduct means conduct which affects performance only when such conduct occurs on school grounds, directly involves students or school property, or occurs only when a teacher is acting in her official capacity. Again the court rejected the teacher's position, stating: "Although such factors may be relevant, the determination of immoral conduct in not limited to those situations."[32]

It is interesting that the court used a two-prong test in deciding *Thomas*. The court opined that, first, the teacher conduct is found immoral, and secondly, it must be determined if such conduct renders the teacher unfit to teach.[33] The court applied no less than eight factors to the question of whether any teacher found to engage in immoral conduct is fit to continue teaching. The factors are:

1. the age and maturity of the teacher's students;
2. the likelihood that the teacher's conduct will have an adverse effect on students or other teachers;
3. degree of anticipated adversity;
4. proximity of the conduct;
5. extenuating or aggravating circumstances surrounding the conduct;
6. likelihood that the conduct would be repeated;
7. underlying motives;
8. the chilling effect on the rights of teachers.[34]

In applying the above *Thomas* factors, the court concluded that the board correctly found that ninth-grade adolescents are very impressionable. The use of violence by a teacher to solve personal problems was likely to have an adverse effect on her students by confusing the violence-free message promoted by the school and the community. In addition, the teacher's violent behavior would adversely affect other faculty and parents because her conduct was a breach of both policy and law, impacting her position as a role model and authority figure. The board found that a classroom teacher is one of the most important role models for adolescents. The teacher's actions contradicted the message sent by the school district, presenting a "do as I say, not as I do" dilemma for her students. The board found her actions might provide a license for

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[32] *Id.* (citing *Youngman*, 890 S.W.2d at 340 n. 7).

[33] *Id.* (citing *Ross*, 662 S.W.2d at 259).

[34] *Id.* at 166 (citing Thompson v. Southwest Sch. Dist., 483 F. Supp. 1170, 1182 (W.D. Mo. 1980).

students to model her behavior instead of her words, also concluding that no justification was provided by the teacher's marital problems.

The teacher went on to argue that it is necessary to show the conduct actually harmed her performance to meet the required nexus. The court noted that the argument is contrary to established law, since only likelihood that the teacher's conduct will have an adverse effect on students or other teachers need be demonstrated.[35] Finally, the teacher tried to argue that her due process rights require that the board wait until she was convicted before it could terminate her contract. In reply, the court noted that the teacher was not terminated for the conviction of a crime but rather immoral conduct; that the conduct occurred was never in question. Accordingly, the board does not have to wait until a conviction to respond to conduct it knows did occur.

Unfitness: Bad language

In *Baldridge v. Board of Trustees, Rosebud County School District*,[36] a tenured high school science teacher was dismissed for being "unfit." The facts involve a number of what school authorities called "uncommon" behaviors occurring across several years. The most recent incident caused the board to move for dismissal. This event, referred to as "the glove" incident, showed the teacher had sought student help in cleaning the lab by placing a rubber glove on his hand, holding the gloved hand in front of his face, palm in, and asking, "May I have a female volunteer?" This incident occurred in three classes in one day.[37] It was discovered that this was not the first time Mr. Baldridge had engaged in the use of "off color" language in the presence of students. The following facts are descriptive:

1. During a heated discussion with a student over a late assignment, Baldridge ultimately responded to the student's request for an extra day in which to turn in the work by telling the student to "Stop, drop and blow." According to Baldridge, "stop" means quit arguing, "drop" means drop the subject, and "blow" means "blow it out your ass," although Baldridge did not use the entire latter phrase with the student.

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[35] *Id.* (citing *Thompson*, 483 F. Supp. at 1182).
[36] 951 P.2d 1343 (Mont. 1998).
[37] *Id.* at 1347.

2. Baldridge stated to several high school students that he would "give [them] twenty bucks if you make that kid cry."
3. Baldridge told a joke in class involving the term "testes" and had been telling the joke to his students for five years.
4. In conversations with students, Baldridge made repeated indirect references to himself and others as a "prick," by stating either "he's what Cinderella [Snow White] did to her finger" or "You guys might think I'm a little," accompanied by a motion to prick his finger.
5. Baldridge "flipped off" or "gave the finger" to students during the school day on school property.
6. After a female student stated that she could not "stand the sight of blood," Baldridge said, "she must have a rough month" or words to that effect.[38]

The teacher appealed the initial dismissal to the county superintendent, who reversed the dismissal. However, the state superintendent agreed with the board and upheld the dismissal. At trial the state district court in Montana upheld the dismissal. The state court of appeals affirmed the district court. It stated in direct reference to the incidents:

> Each of the incidents is inappropriate conduct by a high school teacher toward his students. None properly could be meant or adapted for the purpose of teaching high school science students. Moreover, in addition to being inappropriate conduct in and of itself, Baldridge's behavior demonstrated an inherent lack of judgment regarding a teacher's role and relationship with his students, which relates directly to fitness to teach.[39]

Drunk driving

There are very few cases of teachers succeeding in defending themselves against charges of immorality. However, in *Kibbe v. Elida School District*,[40] a New Mexico teacher of twenty years did win his case. Dwayne Kibbe was arrested for driving while intoxicated (DWI). During the booking process at the police station, Kibbe,

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[38] *Id.*

[39] *Id.*

[40] 996 P.2d 419 (N.M. 2000).

when told to empty his pockets, threw his change on the ground, striking a police officer in the leg. The officer told Kibbe to cooperate, and Kibee then attempted to push his way past the officer but did not strike him. Several officers subsequently restrained Kibbe. Following the incident, Kibbe was charge with three misdemeanor offenses: DWI, resisting or obstructing an officer, and battery. Upon discovery of the charges, the board moved to terminate Kibbe. He was sent the following notice stating the reasons for his termination:

1. You have severely compromised your ability to be an effective teacher, coach and employee by being arrested and charged with driving under the influence of alcohol or drugs, resisting or obstructing an officer and battery, especially in your capacity as the driver's education instructor.
2. You have compromised your effectiveness as a teacher, coach and employee by the public scandal involving your behavior as set forth in the criminal complaint filed by Officer Preston Wilkerson of the Portales City Police and witnessed by Officer Gabe Chavez of the E.N.M.U. Police Department.[41]

According to the school superintendent, almost everyone in the community was aware of Kibbe's arrest for DWI, and the majority of people were against rehiring him. It was the superintendent's position that being a good role model is integral to teaching. He believed that the board did have *just cause* to terminate the contract. The state legislature defines "just cause" as "a reason that is rationally related to an employee's competence or turpitude or the proper performance of [the employee's] duties and that is not in violation of the employee's civil or constitutional rights."[42]

In applying the statutory definition, the Supreme Court of New Mexico reversed the appellate court and ordered a reinstatement of the teacher. The court looked at the record as a whole and concluded:

> we are unable to conclude that the school board introduced substantial evidence that a public scandal, if one existed, would have interfered with the proper performance of Kibbe's duties as a teacher ... the school board did not present evidence that Kibbe's arrest actually affected his ability to teach effectively or to serve as a proper role model for students.[43]

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[41] *Id.* at 420.

[42] *Id.* at 421 (citing NMSA 1978, Sec. 22-10-2(F) (1994)).

[43] *Id.* at 423.

Perhaps what made a difference for the teacher was that, immediately after the incident, he used the event as a teaching tool for the students. In other words, he used his situation to instruct on the dangers of drinking and driving and so forth. This case does sit in contrast to the *Thomas* case discussed earlier. In *Kibbe* the court required that there be some evidence of teaching ineffectiveness as a result of the misbehavior.

Insubordination

Insubordination among teachers has been defined as the willful disregard for or refusal to obey school regulations and official orders.[44] Among the various reasons used by boards to evaluate or dismiss teachers, insubordination is the easiest to show. Unlike incompetence or immorality, which often rests on the sufficiency of evidence, a teacher either disobeyed a rule/order or did not. Perhaps the reason these violations are not more often the focus of terminations is because insubordination is less closely related to the teaching process. Philosophically, it would seem more appropriate to remove a teacher for being an unfit teacher than for "not being a good soldier." Nevertheless, there are school systems that expressly require a high degree of compliance by teachers.

In *Board of Education of West Yuma School District RJ-1 v. Flaming*,[45] a tenured music teacher in Colorado was terminated for insubordination. The teacher struck a child on the head with a wooden pointer because the child was not paying attention. According to the board, the teacher's behavior warranted dismissal because it was her fourth incident of inappropriate physical discipline and because she was on notice after the third incident that another violation of district policy could result in her termination. The discipline policies of the district and the school had a provision for dealing with a disruptive student. In part the policy stated:

> A teacher may use "reasonable and appropriate" physical intervention or force as necessary for six specific purposes, one of which is "for the preservation of order." Also, the principal of each school is empowered to adopt policies limiting even further the use of physical intervention or force by a teacher.[46]

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[44] Annot., 78 A.L.R. 3d 83 (1977).

[45] 938 P.2d 151 (Colo. 1997).

[46] *Id.* at 154.

Although there was not a "no touch" rule in place at the school, Flaming was aware that the principals under whom she served opposed the use of physical intervention or force. Flaming also was required to develop and follow her own classroom discipline plan which stated that a first infraction would result in a "warning" and a second infraction would result in a "time out."

The district policy also provides that:

> In dealing with disruptive students, any person employed by the district may, within the scope of his employment, use reasonable and appropriate physical intervention or force as necessary for the following purposes:
>
> 1. To restrain a student from an act of wrongdoing
> 2. To quell a disturbance threatening physical injury to others
> 3. To obtain possession of weapons or other dangerous objects upon a student or within the control of a student
> 4. For the purpose of self-defense
> 5. For the protection of persons or property
> 6. For the preservation of order.

It was determined that Flaming had been disciplined by the school's principal for using inappropriate physical interventions on three occasions prior to the incident with the wooden pointer. In the first incident, Flaming struck a third-grade student on the hand with a xylophone stick, and the parent of the child complained upon finding red marks on the child's hand. As a result of this first incident, the principal discussed with Flaming more appropriate forms of discipline such as the use of a "time out."

In the second incident, Flaming pulled the hair of a student because the student had his head on his desk and was not paying attention. As a result of this incident, the principal wrote a formal letter of discipline to Flaming, which indicated that such conduct constituted inappropriate physical discipline and that the school followed a "policy of no physical punishment." This letter constituted an official admonishment.

In the third incident, the teacher seized a first-grade student by the shoulders and backed him up against a chalkboard where he bumped his head. Following this incident, the principal issued a reprimand and informed the teacher that any future failure to follow school or district policies concerning physical intervention, or any failure to follow the guidelines of her own classroom discipline plan, would be considered an act of insubordination.[47]

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[47] *Id.* at 154.

Of course, another incident (the wooden pointer) followed, and the board moved to terminate her contract. The Supreme Court of Colorado upheld the dismissal.

In another Colorado case, a tenured language arts teacher was found insubordinate for failing to follow the district's "controversial materials" policy.[48] The teacher showed an R-rated film to a group of seniors during a logic and debate class. The film, entitled *1900*, contained full frontal nudity, oral sex, masturbation, profanity, cocaine abuse, and graphic violence. The teacher showed this film to his class without notifying the principal. A district policy requires teachers to exercise special care when using "controversial learning resources." It states:

> Controversial learning resources include [those] which are not included in the approved learning resources of the district and which are subject to disagreement as to appropriateness because they refer or relate to controversial issues or present material in a manner or context, which is itself controversial. It is expected that teachers will work cooperatively with their principal and other administrators in the use of controversial learning resources.[49]

The policy also provides teachers with specific guidelines to be followed in using such resources:

1. [C]ontroversial learning resources are permitted in accordance with this regulation as long as the issue or resource is relevant to the curriculum objectives of the course.
2. The principal must be informed in writing of all planned teaching of controversial issues or use of controversial learning resources as soon as reasonably possible and, in any case, not less than 20 working days in advance of their presentation to students. Such notification must include an identification of the controversial issue or resource, a description of the proposal and a statement of the educational purpose of the proposal.

After the first class in which *1900* was shown, one of the students asked why they were watching the film. The teacher responded that if any students felt embarrassed or uncomfortable they could look away or put their heads down. He also offered them

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[48] Board of Educ. of Jefferson County Sch. Dist. R-1 v. Wilder, 960 P.2d 695 (Colo. 1998).

[49] *Id.* at 698.

the option of going to the library for an alternate assignment. Although no students went to the library, several of them stated that watching *1900* made them uncomfortable. When one student complained at home, her mother phoned Principal Mitchell, concerned that the school had been showing her daughter a film with nudity and strong sexual content. Principal Mitchell confronted the teacher, who admitted that the film contained graphic subject matter. After screening portions of *1900*, Principal Mitchell and other school administrators agreed that the film was a controversial learning resource and that the teacher should have obtained administrative approval prior to showing the film.

The principal placed the teacher on leave, pending further action by the district. The superintendent of schools determined that by failing to provide the principal with twenty days' notice prior to showing *1900*, the teacher violated the district's controversial materials policy. Based on this violation the superintendent recommended dismissal. The board did move to dismiss Alfred Wilder from his teaching position, a decision which was ultimately upheld by the Supreme Court of Colorado.[50]

[50] *Id.* at 699.

Procedural Aspects of an Evaluation

The administration may select teacher evaluation procedures that subject the school board to legal challenges. The procedures followed must conform to the fundamental elements of the due process requirements of the Fourteenth Amendment to the Constitution. Elements of due process are reflected in (1) using an evaluation instrument that is objective and that provides adequate notice to the teacher of the criteria that will be used and, (2) an opportunity to remediate the deficiencies cited in the evaluation may be required by statutes, board policy, or collective agreement.

The procedures used can vary widely from state to state and even from school district to school district. Variations are a product of the extent to which state legislatures establish procedures by statute. Where the legislature prefers deferring to local control, the state education agency may regulate procedures. Once statutory and regulatory parameters are recognized, the local school board may condition the evaluation procedures on collective bargaining agreements with the teachers' organization. The procedural aspects of evaluating a probationary teacher are often different from those procedures used with tenured teachers. Regardless of which or how many levels of control shape the evaluation procedures, the Fourteenth Amendment can be used by disaffected teachers to challenge the procedures.

However, if an evaluation procedure is challenged as a violation of due process under the Fourteenth Amendment, the failure of school authorities to follow statutory procedures does not necessarily render the process unconstitutional. For example, in *Galat v. Hamilton City School District Board of Education*,[1] under the master contract the school district was required to perform a minimum of three formal classroom observations, each of at least thirty

[1] 85 Ohio St. 3d 1427, 707 N.E.2d 517 (1999).

consecutive minutes, resulting in two formal written evaluations. Two observations were required before the first evaluation and one observation was required before the final evaluation. The evaluation procedure in the master contract differed from the procedures set forth in the statute in that the master contract provided for a minimum of three classroom observations, while the statute required four. The teacher was terminated after he received notice, specification of the charges, and a hearing where he was able to present his defense. At the hearing, the teacher challenged the procedures used in his teaching evaluation as a violation of his due process guarantees arguing, in part, that he should have been evaluated pursuant to the procedures set forth in the statute rather than the master contract. The court found, after an evaluation of the applicable law that the parties had "entered into a contract with the intent of being bound by the terms of the contract, including but not limited to, the provisions for evaluation which are different than the Ohio Revised Code."[2]

On the other hand, a state court is likely to hold the school board to strict compliance with established evaluation policies. In *Shepard vs. Fairland Local School District Board of Education*,[3] the teacher filed a complaint in the Lawrence County Court of Common Pleas, alleging that the nonrenewal of her contract was improper because the correct teacher evaluation process had not been followed. The teacher argued that she was not properly evaluated under the statute because the evaluations did not contain the criteria of expected job performance, specific recommendations regarding desired improvements, or the means by which she could obtain assistance in making such improvements. Further, the teacher argued that she was not observed two times for each written evaluation as required by the statute. The court noted in *Farmer v. Kelley's Island Board of Education*[4] that the statue required a two-to-one ratio of observations to written evaluations. In finding the teacher was observed on three different occasions and given three written evaluations, the court found this did not meet the two-to-one ratio required.[5]

The board's failure to comply with the evaluation requirements of the statute constituted a procedural ground upon which the court reversed the board's decision not to reemploy the teacher. The court ordered the board to reemploy the teacher and further held the

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[2] *Id.*

[3] 2000 WL 1717551 (Ohio Ct. App. 2000).

[4] 69 Ohio St. 3d 156, 159, 630 N.E.2d 721 (1994).

[5] 2000 WL 1717551 (Ohio Ct. App. 2000).

teacher was entitled to back pay that accumulated from the time when the board improperly chose not to renew the teacher's contract.[6]

Using Objective Criteria

Objective criteria concerning teaching performance should be incorporated into the evaluation and used to evaluate each teacher. However, vague criteria statements alone may not render an evaluation invalid. In *McComb vs. Gahanna-Jefferson City School District Board of Education*,[7] the court found certain statements in the evaluations as being too vague for the teacher to understand. However, the court, citing *Rickel v. Cloverleaf Local School District Board of Education*,[8] held the statute "does not place the burden upon the school board to assure that every teacher fully appreciates every suggestion for improvement or recommendation as to the means by which the teacher may obtain assistance in making the suggested improvements."[9] The court noted that judicial inquiry is limited simply to whether the board supplied "specific recommendations regarding any improvements needed in the performance of the teacher being evaluated" and whether suggestions were made "regarding the means by which the teacher may obtain assistance in making such improvements."[10] The record demonstrated that the board fulfilled this procedural requirement.

While objective criteria are an essential part of the evaluation, an evaluator is not precluded from using "subjective" observations as part of the overall process. In *Layman v. Perry Local School District Board of Education*,[11] the board, on April 26, 1999, voted not to reemploy Layman. Layman received a written statement of circumstances explaining why she was not being offered continued employment. The report listed twenty-two reasons addressing her personal and professional judgment; her planning and delivery of lessons; her relationships with students, parents, and school staff members; how well she followed school procedures; and her professional growth and development. At her hearing, Layman objected to the use of two subjective items in the report with respect to her personal and professional judgment. Her objection was also based

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[6] *Id.*

[7] 130 Ohio App. 3d 664, 720 N.E.2d 984 (Ohio Ct. App. 1998).

[8] 79 Ohio App. 3d 810, 814, 608 N.E.2d 767 (1992).

[9] 130 Ohio App. 3d 664, 720 N.E.2d 984 (Ohio Ct. App. 1998).

[10] *Id.*

[11] 94 Ohio St. 3d 1410; 759 N.E.2d 787 (2001).

on the fact that those incidents regarding her personal and professional judgment occurred in 1995 and 1996. In 1995, Layman had used school telephones to call a psychic hotline. These calls generated a bill of $792.29. The school had to conduct an investigation to determine who placed the calls. In 1996, Layman sent an email to school staff members that was racially derogatory and sexually offensive.

The Appellate Court of Ohio ruled that the lower court found the board properly expressed twenty-two clear and substantive reasons underlying its decision not to reemploy Layman. The court further held that the reasons set forth in the statement of circumstances were clear and substantive.[12]

In support of her argument that the board improperly relied on the incidents which occurred in 1995 and 1996, as a basis for nonrenewal of her contract, Layman cited R.C. 3319.111(A), which set forth the requirement that in any year a board of education wished to declare its intention not to renew a teacher's limited contract, it must conduct evaluations in compliance with Chapter 3319. On the basis of this requirement, Layman argued the board is bound to limit its reasons for nonrenewal to circumstances that occurred in this time period, and may not consider prior events. The court ruled that the board's statement of circumstances set forth twenty other reasons why the contract was not being renewed. It held that R.C. 3319.111(A) places no express limit on the time frame a board of education might consider in its decision. Rather, it simply requires that an evaluation be done in any year in which a board of education might wish not to renew an individual teacher's contract.

Finally, Layman argued that the ruling in *Manno v. Chardon Local School District Board of Education* held that a school board did not err by declining to allow the admission of evidence regarding a teacher's performance prior to the period in which the statutorily required evaluation is conducted. However, the court ruled this was not synonymous with saying that a school board may not admit evidence of prior performance, or prior events or acts. The court reasoned in this regard, *Manno* stands for the proposition that a school board is not required to consider a teacher's performance prior to the evaluation period, and may base its decision strictly upon the performance observed during that period. However, the court held there is no statutorily imposed limitation forbidding the board's consideration of such evidence prior to the period of evaluation.[13]

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[12] *Id.* at 789.

[13] *Id.*

In *Fields v. Tulsa Public Schools*,[14] an administrator issued a Job Targets Report to a teacher as part of the teacher's evaluation. A Job Targets Report is a written document designed to advise teachers of the deficiencies in their performance, to specify the improvement required and the assistance to be provided, and to establish a target date for improved performance. Fields argued that the Job Targets Report lacked the specificity required to satisfy the statute's admonishment requirements. In its rejection of Fields' argument, the court held that:

> Although we agree that, on its face, the Job Targets Report issued to Fields on November 14, 2000 lacks the sort of specificity required by the form's own written instructions, the admonishment statute merely requires that the administrator "admonish the teacher, in writing, and make a reasonable effort to assist the teacher in correcting the poor performance or conduct"; it does not dictate how specific the admonishment must be. Furthermore, all Fields needed to do to discover the more precise nature of the observed problems with her teaching performance was to cross-reference the numbers on the Job Targets Report with the entries on her evaluation form. It is frankly difficult to see how the Job Targets Report is not specific enough to put Fields on sufficient notice of the nature of her perceived deficiencies so that she might strive to correct them.[15]

The issue of objective evaluation criteria was addressed in *Shepard v. Fairland Local School District Board of Education*.[16] In *Shepard*,the teacher argued (*inter alia*) that she was not properly evaluated under R.C. 3319.111(B) because the evaluations did not contain the criteria of expected job performance, specific recommendations regarding desired improvements, or the means by which she could obtain assistance in making such improvements.

Specifically, the teacher argued that the evaluations were insufficient because they did not include any specific recommendations regarding any needed improvements or any means by which she could obtain assistance in making the recommended improvements. The court agreed. It held the first evaluation by the principal did not make any recommendations or direct the teacher toward any resources from which to obtain guidance. The evaluation

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[14] 2002 Okla. Civ. App., LEXIS 92.

[15] *Id.*

[16] 2000 WL 1717551 (Ohio Ct. App. 2000).

contained a section entitled "Recommendations" but the items listed appear to be criticisms of the teacher's teaching style rather than recommendations on how to improve it. For example, the principal indicated, "Student performance levels are not up to Fairland standards." Even though some of the items listed were considered to have been recommendations, the court found that no means of improvement were suggested. In the final evaluation, the principal simply noted that discipline needed improvement but made no specific recommendations on how to improve it and suggested no resources.[17]

It should be noted that *who* evaluates teachers can be a legal issue. In a Pennsylvania case, *Bangor Area Education Association v. Bangor Area School District*,[18] the issue was whether or not a board member had the right to examine portions of teachers' personnel files so as to determine how evaluations were being conducted. The board member was attempting to determine whether there were issues that affected the teachers' ability to educate. The Bangor Area Education Association argued that the inspection of teacher personnel files by a single board member was illegal.[19]

The trial court issued a decree nisi finding that an individual board member lacks authority to review teacher evaluations. On appeal, the district asserted that individual board members have an implied right to review teacher evaluations. Specifically, the district contended that the authority granted to the board as a whole to review the personnel files of teachers could be inferred to individual board members who act unilaterally. The district contended that because the Public School Code of 1949 conferred upon the board the responsibility of managing the affairs of the district, it also conferred upon the board any implied powers which were necessary to give effect to this responsibility, including the review of teachers' personnel files by individual members of the board.[20]

The court disagreed in holding the code conferred no authority upon individual school board members to act unilaterally under the guise of carrying out the responsibilities of a board as a whole. Rather, the law was clear that actions by a school board are taken by collective authority.[21]

In contrast, Oklahoma statute specifically confers on individual board members the authority to identify poor performance or conduct. The statute provides that whenever a member of the board of

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[17] *Id.*

[18] 720 A.2d 198 (Pa. Cmmw. Ct. 1998).

[19] *Id.*

[20] *Id.* at 199.

[21] *Id.* at 203.

education identifies poor performance or conduct that may lead to a recommendation for dismissal or nonreemployment of a teacher within the district, the administrator who has responsibility for evaluation of the teacher is to be informed. The administrator then must initiate the procedures for admonishment of the teacher.[22]

Remediation

In the remediation model of teacher evaluations, teachers who receive unsatisfactory summative evaluation readings are required to participate in formal remediation sessions to correct identified weaknesses.[23] The remediation model is used to improve skills of teachers who fail to meet teaching standards. Therefore, the model is most effective for teachers with less teaching experience. However, the model may also be effective for experienced teachers who have received several years of competent evaluations.

In *Newcomb v. Humansville R-IV School District*,[24] a teacher with seventeen years' experience failed to comply with specific recommendations to improve her performance. The teacher complained that prior evaluations indicated that she was competent and that the district had created the conditions for her termination by placing a disproportionate number of male students and students with disabilities in her class. The court held the teacher failed to comply with curative recommendations and there was no merit to her argument that the district had engineered her termination by putting her in charge of the school's only third-grade class.

Once deficiencies are noted as a result of the evaluation, many states' statutes require that the teacher be given a reasonable amount of time to improve. In addition, the school administration typically has some responsibility for assisting the teacher during this period of improvement.

In *Layman v. Perry Local School District Board of Education*,[25] Layman argued that the district did not comply with the statute, R.C. 3319.111(B)(3), which places a specific requirement on the content of teacher evaluations assisting Layman during the period of improvement. Specifically, the statute required (*inter alia*):

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[22] 70 O.S. 6-101.24(C).

[23] Pfeifer, R. (1986) *Integrating teacher evaluation and staff development: An organizational approach*. Stanford, CA: Stanford University, INST. FOR RESEARCH ON EDUC. FINANCE AND GOVERNANCE. Paper presented at the Annual Meeting of the American Educational Research Association (San Franciso, CA, Apr. 16-20, 1986).

[24] 908 S.W.2d 821 (Mo. App. S.D. 1995).

[25] 94 Ohio St. 3d 1410; 759 N.E.2d 787 (2001).

> A written report of the results of the evaluation that includes specific recommendations regarding any improvements needed in the performance of the teacher being evaluated and regarding the means by which the teacher may obtain assistance in making such improvements.[26]

Layman contended her evaluations did not contain the specific recommendations regarding improvements needed, or regarding the means by which she might obtain assistance in making the improvements, as required by the statute. The court found that the evaluations did contain recommendations as required by statute. The court stated:

> Some of the recommendations, based upon Principal Kapostasy's observations include, but are not limited to: (1) having remaining students work in small groups, rather than waiting in line, while appellant engages in one-on-one time with other students; (2) instead of expecting quick responses to questions, allow 3-7 seconds to facilitate student responses; and (3) adapt lesson plans to the differing levels, needs and learning rates of the individual students.[27]

The court went on to state:

> A review of the record indicates other specific recommendations were made in the evaluations. Also, most of the recommendations are of a nature that would not require Layman to obtain assistance to make the improvement. For example, if Layman was not allowing students enough time to respond to questions, she simply needs to allow enough time for a response, she does not need outside assistance. However, there were some specific referrals, such as that Layman read the minutes of a school committee "to make sure that you can fulfill your responsibilities."[28]

In *McComb vs. Gahanna-Jefferson City School District Board of Education*,[29] McComb asserted the evaluations failed to meet the requirements of R.C. 3319.111(B)(3) because they did not in-

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[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] 130 Ohio App. 3d 664, 720 N.E.2d 984 (Ohio Ct. App. 1998).

clude specific recommendations regarding any desired improvement and the means by which McComb could obtain assistance in making such improvements. In considering McComb's assertion, the court held:

> While the evaluator in these reports did in some areas provide adequate specific recommendations for improvement and means to obtain assistance, in other areas such as "encourages student participation" he did not. We hold that the failure of a board of education to satisfy the requirements of R.C. 3319.111(B)(3) constitutes a failure to comply with the evaluation requirements of R.C. 3319.111(A), and such failure will permit a reviewing court to order the board to reemploy the teacher pursuant to R.C. 3319.11(G)(7).[30]

In *Springer v. Board of Education of Cleveland Heights-University Heights School*,[31] Springer asserted the plan for improvement was merely a paraphrase of the definitions contained in the collective bargaining agreement, and no specific recommendations were provided. She also alleged the plan for improvement did not relate to the areas listed as needing improvement. Springer did not feel that her principal and evaluator, Helmick, gave her any meaningful support for improving discipline in her classroom that Helmick assessed as unsatisfactory on her evaluation.

The court held that while some of the improvement plans could apply generically to all classrooms, the improvement plans did not lack specificity. The common pleas court did not abuse its discretion in finding that the improvement plans were specific enough to put Springer on notice of the need for change. The improvement plans appeared to relate to the problem areas and the trial court did not abuse its discretion in finding the evaluation would not be overly confusing for the average teacher.

The court noted the evaluation showed that Helmick spent a day at Springer's school, gave her two books on discipline methods, and expressed her willingness to help and support Springer. Moreover, the court held the evaluation sufficiently stated the means to obtain assistance. While Springer asserted that these recommendations were not helpful, the court ruled it could not inquire as to whether the suggestions were reasonable. It held that judicial inquiry is limited simply to whether suggestions were made "regarding the means by which the teacher may obtain assistance."[32]

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[30] *Id.* at 987.

[31] 2000 WL 263367 (Ohio Ct. App. 2000).

[32] *Id.*

Statutory Deadlines

A state statute may also proscribe the method for determining the period of time in which a remediation plan is to be conducted. The remediation plan usually consists of two parts: didactic instruction and classroom practice. The object of the plan is to bring all teachers to a minimal level of competence using specific instructional criteria.[33]

In *Bentley v. School District No. 025 of Custer County*,[34] Maris Bentley brought an action for declaratory judgment, requesting that the trial court find that the appellant, Custer County School District No. 025 (also known as Broken Bow Public Schools), did not properly notify her of the proposed nonrenewal of her probationary teaching contract and that her contract was therefore renewed. The trial court held that the district did not properly notify Bentley prior to April 15, 1996, as required by Neb. Rev. Stat. Section 79-12, 114 (Reissue 1994), and that the failure to properly notify resulted in her continuing employment.[35]

On April 12, 1996, Bentley spoke with the Broken Bow School Superintendent, Dr. Timothy Shafer, about the evaluation she received on April 10. Bentley asked Shafer about a "win-win" situation, in which Shafer would offer Bentley a contract for the next school year and Bentley would then resign. Shafer declined Benley's offer and told her that she should just resign. On April 13, Bentley called James Christen, president of the school board, at his home, wanting to discuss "her situation." Christen told Bentley he could not discuss the situation with her.[36]

On April 16, 1996, Shafer hand delivered a letter to Bentley which stated that he intended to recommend to the school board that Bentley's contract not be renewed. The letter also explained Bentley's right to have a hearing on the matter and how to go about requesting such a hearing. After receiving the letter, Bentley spoke with a staff member of the Nebraska State Education Association, who told Bentley the notification was late and that Bentley might be waiving her rights if she were to request a hearing at that point. Bentley did not request a hearing. On May 13, 1996, the school board adopted a resolution not to renew Bentley's contract, thereby ending Bentley's employment with the Broken Bow school district.[37]

The court ruled that the evaluation Bentley received on April 10, 1996, did not serve as "formal" notice of the proposed nonrenewal

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[33] Seyfarth, J.T. (2002) Human Resources Management for Effective Schools.

[34] 225 Neb. 404, 586 N.W.2d 306 (1998).

[35] *Id.* at 307.

[36] *Id.*

[37] *Id.*

of Bentley's contract as required by statute. The court further found that the district's failure to properly notify Bentley prior to April 15 resulted in Bentley's continued employment with the appellant.[38]

The board claimed the evaluation Bentley received on April 10, 1996, from her principal, Don Bartholomew, provided Bentley the written notice required by statute. However, the court found that the evaluation did not satisfy the requirements of the statute. The evaluation was given to Bentley by Bartholomew, and the cover page directed that the document was "TO: Dr. Timothy Shafer" and "FROM: Don Bartholomew." Therefore, the evaluation reflected only Bartholomew's suggestion to Shafer that Bentley's contract not be renewed. Even though the evaluation stated that Bartholomew was recommending to Shafer and to the school board that Bentley's contract not be renewed, Bartholomew did not have the authority to make such a recommendation to the school board.[39]

In Oklahoma, the statute provides for the administrator charged with evaluating the teacher to "establish a reasonable time for improvement, not to exceed two months, taking into consideration the nature and gravity of the teacher's performance or conduct."[40] Notice provided to the teacher of the specific period of time in which the teacher must meet the requirement(s) of the plan for improvement is a critical procedural due process issue because:

> If the teacher does not satisfy the conditions of the plan for improvement ***within the established time*** the administrator shall make a recommendation to the superintendent of the school district for the dismissal or nonreemployment of the teacher.[41]

In *House v. Independent School District I-29 of Muskogee County*,[42] pursuant to the Teacher Due Process Act of 1990, the principal issued a "plan for improvement" (which includes an admonition) to the teacher on January 7, 1994. The Act proscribes:

> When an administrator who has carried out an evaluatoin of a teacher as specified by Sections 71 and 72 of this act [or §§ 6-101.10 abd 6-101.11] identifies poor performance or conduct that the administrator believes may lead to a recommendation for the teacher's dismissal or nonreemployment, the administrator shall:

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[38] *Id.*

[39] *Id.* at 308.

[40] 70 O.S. §6-101.24.

[41] 70 O.S. §6-101.24(B) (emphasis added).

[42] 939 P.2d 1127 (1997).

> 1. Admonish the teacher, in writing, and make a reasonable effort to assist the teacher in correcting the poor performance or conduct; and
> 2. Establish a reasonable time for improvement, not to exceed two (2) months, taking into consideration the nature and gravity of the teacher's performance or conduct ...
>
> If the teacher does not correct the poor performance or conduct cited in the admonition within the time specified, the administrator shall make a recommendation to the Superintendent of the school district for the dismissal or nonreemployment of the teacher.[43]

On February 2, 1994, the principal issued a three-part plan for improvement and again discussed the problem areas with the teacher. Those areas included the need to properly monitor students' progress and to become a better role model through better control of the class. The plan also gave written notice to the teacher that "failure to make reasonable long-term efforts to meet these objectives may result in non-renewal of contract."[44]

On March 8, 1994, the principal evaluated the teacher and found unsatisfactory performance in several areas and little, if any, improvement as prescribed by the plan. Following the March 8 evaluation, no classes were held during a two-week spring break, and the teacher was absent for another two weeks due to illness. She did not resume teaching until April 4. On April 22, the principal again observed the teacher in class. She witnessed poor performance and a failure to fulfull the plan's objectives. On May 3, 1994, the superintendent suspended the teacher with full pay and benefits. On his recommendation that the teacher be dismissed, the board of education held a hearing in June. Later, by a unanimous vote, the teacher's employment was terminated.[45]

The plaintiff-teacher argued that the school failed to specify a reasonable time for improvement in the plan for improvement pursuant to the Teacher Due Process Act. However, the court found the teacher offered nothing to indicate how she might have been prejudiced by the principal's omission. Instead, the teacher focused solely on the principal's failure to include in the plan a specific

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[43] 70 O.S. Supp. 1992 § 6-101.24.
[44] 939 P.2d 1127 (1997).
[45] *Id.*

amount of time. The court noted explicit statutory requirement that plans for improvement include a specific yet reasonable time (not exceeding two months) within which the poor performance or conduct may be corrected is a mere technical requirement, where, as in this case, a teacher has been given more time than the statutory maximum and has thereby benefited from the non-compliance.[46]

In a recent Oklahoma case, *Morrison v. Board of Education of Weatherford Public Schools*, the school district relied on the "substantial compliance" reasoning in *House* regarding notification to the teacher of the board's intent to nonreemploy the teacher for the following school year.[47] In this case the superintendent instructed the principal to hand deliver a letter of notification of the superintendent's intention to recommend to the board that the teacher's contract not be renewed. The gravamen of the case concerned the interpretation of 70 O.S. Supp. 1993 Section 6-101(E) that states, in part:

> If, prior to April 10, a board of education has not entered into a written contract with a regularly employed teacher or notified the teacher in writing by registered or certified mail that a recommendation has been made not to reemploy the teacher for the ensuing fiscal year ... such teacher shall be considered as employed on a continuing contract basis ... for the ensuing fiscal year.

The court in *Morrison* held the superintendent's letter to the teacher (via hand delivery by the principal) was a "proposal only and fell short of starting the statutory process for termination of a teacher's employment contract." It was "no mere technical violation."[48]

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[46] *Id.* at 1131.

[47] 47 P.3d 888, *cert. denied* (Okla. Civ. App. 2002).

[48] *Id.*

The Use of Testing in the Evaluation of Teachers

Accountability has been at the center of the education reform movement since the 1980s. Prior to the reform movement, legislation rarely focused on teacher evaluation policies. However, that changed with the focus on accountability as manifested in the 1983 document, *A Nation at Risk: The Imperative for Educational Reform*,[1] from the National Commission on Excellence in Education. In particular, the document focused on the need for accountability in teacher performance. To a large degree, the information from the document was the source for reform in improving teacher evaluations by state-level policymakers.

A major area in reforming teacher performance included teacher testing. Generally, these tests are paper-and-pencil or computer-administered. The scores measure knowledge, skills, and abilities relevant to the performance of teaching. The tests are then scored to some standardized set of criteria.[2]

Forty-one states require the successful completion of a teacher test to qualify for initial credentialing.[3] Per the new federal requirements under Title II of the No Child Left Behind Act of 2001,[4] other states will likely add teacher-testing programs to promote more extensive use of teacher testing. The programs are also designed to achieve greater accountability for higher education teacher preparation programs. Title II requires federal and state governments to rank higher education institutions on the basis of student

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1 Task Force on Education for Economic Growth, Action for Excellence (Education Commission of the U.S. 1983).

2 Haertel, G. *Teacher-Performance Assessments: A New Kind of Teacher Examination*, Assessment of Teaching: Purposes, Practices, and Implications for the Profession (1990).

3 Commission on Assessment and Teacher Quality of the Board on Testing and Assessment of the National Academy of Sciences, Tests and Teaching Quality: Interim Report (2000).

4 Pub. L. 107-110, 20 U.S.C. §§ 6601 et seq.

performance on state teacher tests. In addition, colleges and universities must report on the success of their students on teacher tests in institutional catalogs and relevant publications.[5] The results of the institutions of higher education report cards are used by states to rank those institutions. However, the validity of such rankings has been challenged due to the fact that states use many various types of testing practices and passing scores. Moreover, states have different approaches to admission, graduation, and the manner in which state teacher tests are used.

The consequences of teacher testing are high for individuals seeking certification and higher education institutions who prepare teachers. Institutions who fail to comply with the federal requirements may be subject to fines[6] or forfeiture of federally funded student financial aid with low student performance on teacher tests.[7] Most teacher-testing litigation has been based on racial discrimination against minority teachers. However, as teacher testing is utilized more, litigation will probably increase in others areas as well, such as disability rights.

Richardson v. Lamar County Board of Education[8] is an example of the national breadth of the impact of teacher-testing litigation. In this case, lawsuits were filed against the state of Alabama as well as local school districts that relied upon results from the state teacher test to make employment decisions. As part of the settlement of the civil rights lawsuit, a moratorium was imposed on all teacher testing in the state. The settlement was the result of the federal district court ruling that the testing company (National Evaluation Systems) that developed the test for the state engaged in practices "outside the realm of professionalism and violated the minimum professional requirements for test development."[9] In addition, the court held that decisions in test development by the company resulted in test scores that were arbitrary and capricious and bore no rational relationship to teacher competence.[10]

Several themes run through the case law on competency testing. First is the central importance of the validity of the test. A test that does not measure what it purports to measure will be subject to attack on several fronts. Second is the concern in the courts over actions that have disproportionate effects on a particular class of persons in our society. Thus, any testing procedure that has a disparate impact on minorities, or perhaps on older Americans or persons with disabilities, will be particularly suspect.

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5 20 U.S.C. § 1027(f).
6 20 U.S.C. § 1027(f)(2)(D)(3).
7 20 U.S.C. § 1028(b)(1999).
8 729 F. Supp. 806 (M.D. Ala. 1989), aff'd 935 F.2d 1240 (11th Cir. 1991).
9 *Id.*
10 *Id.*

A final theme to keep in mind is the pervasive attitude of judicial deference to the decisions of educational policymakers. Judges are very reluctant to second guess educators in matters of educational policy, and this general posture probably will play a significant role in the area of teacher competency testing—with the result that even tests of questionable merit may be upheld in the courts.

Test Validity

The use of competency testing is designed to improve the quality of teaching in the public schools by weeding out incompetent teachers and by providing an incentive to current teacher to improve their skills. Certainly these are admirable goals, but with teachers' livelihoods at stake, competency testing cannot survive unless the examinations do what they are intended to do—measure the competence of the teachers tested. In other words, the test must be valid.

The first step in determining the validity of a competency examination is to select an appropriate validation technique. The courts generally have relied upon two sets of standards for test validation: the Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines) adopted by the Equal Employment Opportunity Commission (EEOC),[11] and the Standards for Educational and Psychological Testing (APA Standards).[12] Fortunately,

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[11] 29 C.F.R. §1607.1-.18 (1989). The reader should note at the outset that the primary purpose of these guidelines is to assist employers in complying with federal laws prohibiting *discrimination* on the basis of race, religion, sex, and national origin. They "do not require a user to conduct validity studies of selection procedures where no adverse impact results." Id. §1607.1(B). However, the use of competency tests traditionally has had disproportionate impact on minorities, *see* infra text accompanying notes 133-40, so the guidelines generally will be applicable in the teacher-testing arena. Moreover, the use of invalid tests will be subject to attack on constitutional grounds even if there is no disparate impact. *See, e.g.*, Armstead v. Starkville Mun. Separate Sch. Dist., 461 F.2d 276 (5th Cir. 1972); Georgia Ass'n of Educators, Inc. v. Nix, 407 F. Supp. 1102 (N.D. Ga. 1976). All users, therefore, "are encouraged to use selection procedures which are valid, especially users operating under merit principles." 29 C.F.R. §1607.1(B)(1989).

[12] American Psychological Association, Standards for Educational and Psychological Testing (1985) [hereinafter APA Standards]. While the Standards are published by the American Psychological Association, they are actually the joint product of three cooperating organizations: the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education. The 1985 Standards represent modifica-

the two sets of standards are consistent, so compliance with one will constitute compliance with the other.[13]

The three generally recognized methods of test validation under both the EEOC's Uniform Guidelines and the APA Standards are (1) criterion-related validation, (2) content validation, and (3) construct validation. One's choice of validation strategy is dictated by the kind of inference the user wishes to draw.

A criterion-related validity study identifies relevant measures (criteria) of job performance and then compares test scores to the level of success on these measures of job performance. For a test to be valid, there must be a statistically significant positive correlation between high test scores and successful performance on the job.[14] There are two types of criterion-related validation: predictive, in which test are administered to prospective employees and test scores are compared to later job performance, and concurrent, in which test are administered to incumbent employees and test scores are compared to current job performance. Concurrent validity studies will be most relevant in the context of evaluating present teacher-employees.

A content validity study, according to the Uniform Guidelines, should show that "the content of the [test] is representative of important aspects of performance on the job."[15] This type of validation is appropriate when the test itself closely approximates a sample of work done on the job.[16]

Construct validation applies when the test being validated is used to determine whether the test-taker possesses certain traits or characteristics (constructs) deemed to be important for successful performance of the job.[17] This is the most complex strategy of the three. It is particularly difficult to identify the constructs (general traits, such as intelligence, verbal fluency, or leadership) that are necessary for successful performance of the job, and to ensure that the test accurately measures those constructs.

The Uniform Guidelines and APA Standards each include a detailed set of technical standards that are to be followed in actually conducting any of the above validation studies. On their face, these standards are very stringent, and there is considerable de-

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tion and extension of similar standards promulgated first in 1966 in and revised in 1974.

[13] *See* 29 C.F.R. §1607.5(C) (1989) (Uniform Guidelines "intended to be consistent with" APA Standards).

[14] 29 C.F.R. §1607.14(B); APA Standards, *supra* note 5, at 11-12.

[15] 29 C.F.R. §1607.5(B) (1989); *see also* APA Standards *supra* note 5, at 10-11.

[16] 29 C.F.R. §1607.14 (C)(1) (1989).

[17] 29 C.F.R. §1607.5(B) (1989); APA Standards *supra* note 5, at 9-10.

bate over whether courts should demand strict adherence to them in employee testing cases. Certainly the courts themselves have been inconsistent in their deference to the standards. The future of teacher competency testing, then, may depend in large part upon how exacting the courts are in their demands for test validation.[18]

The United States Supreme Court first addressed the issue of test validation in *Griggs v. Duke Power Co.*,[19] where the Court held that Title VII prohibits facially neutral practices, adopted without discriminatory intent, if those practices have an adverse impact on a protected group and the practices do not bear a "manifest relationship to the employment in question."[20] *Griggs* involved a challenge to Duke Power's requirements of a high school education and satisfactory scores on two professionally prepared aptitude tests as conditions of obtaining any of a number of mostly blue-collar positions with Duke Power Company.[21] The Court stated that employment tests must be "a reasonable measure of job performance" and suggested that the EEOC's Uniform Guidelines were entitled to "great deference."[22] The central holding of *Griggs* was that a plaintiff might challenge facially neutral practices that are adopted without discriminatory purpose if the practices result in an adverse impact on a "protected class." The plaintiff will prevail on such a showing unless the employer can demonstrate business necessity or job relatedness.

Following *Griggs*, the Court considered the use of two preemployment, general ability tests (one designed to test nonverbal intelligence and the other designed to test general verbal ability) in *Albemarle Paper Co. v. Moody*.[23] The employer in that case had hired an industrial psychologist to validate the job relatedness of its testing program, but the Supreme Court carefully measured the validation study against the Uniform Guidelines and found it to be defective in several respects. Once again, the Court stated that the guidelines were "entitled to great deference."[24]

The Court's strict application of the Uniform Guidelines in *Albemarle Paper Co.* drew extensive criticism. Indeed, even the American Psychological Association, upon whose standards the Uniform Guidelines were based, joined in the reproach, asserting

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[18] *See* Beckham, *Standardized Examinations as Measure of Teacher Competence*, 30 Educ. L. Rep. 995, 998 (1986).

[19] 401 U.S. 424 (1971).

[20] *Id.* at 432.

[21] *Id.* at 425-26.

[22] *Id.* at 433-34.

[23] 422 U.S. 405 (1975).

[24] *Id.* at 431 (quoting *Griggs*).

that an unyielding application of the guidelines would result in "professionally unrealistic effectively unattainable requirements."[25]

The Civil Rights Act of 1991[26] and its vetoed predecessor, the Civil Rights Act of 1990,[27] represent Congress's response to addressing the tension between individual equality and group equality—between equality of treatment and equality of result. Proponents defended the 1991 Act, declaring that it advanced individual equality. Opponents attacked the Act as an attempt to codify notions of group entitlements and quotas. Although the Act purportedly had little to say about affirmative action, whether described as "quotas" or mere "preferences," concerns about affirmative action constituted the undercurrent of the debate from the outset.

The 1991 Act was, in large part, a response to a series of Supreme Court decisions handed down during the 1988 term.[28] The most controversial of these cases was *Wards Cove Packing Co. v. Atonio,* which many commentators considered to be a substantial cutback on, if not an overruling of, the Court's 1971 decision in *Griggs v. Duke Power Co.*

In *Wards Cove,* the Court considered a disparate-impact suit brought by nonwhite, mostly Filipino and Alaska Native, cannery workers against two salmon canneries.[29] The plaintiffs alleged that a variety of the employers' hiring and promotion practices had created a racially stratified work force.[30] Most of the cannery jobs were

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[25] Brief for the Division of Industrial-Organizational Psychology of the American Psychological Association as amicus curiae at 20, Washington v. Davis, 426 U.S. 229 7 (1976), reprinted in 88 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES CONSTITUTIONAL LAW, 281, 309 (P. Kurland and G. Casper, eds. 1977).

[26] Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in sections of 42 U.S.C.A., 2 U.S.C.A., 16 U.S.C.A. and 29 U.S.C.A.).

[27] H.R. REP. NO. 856, 101st Cong., 2d Sess., 136 CONG. REC. H9552-54 (1990).

[28] *See* Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (holding that 42 U.S.C. § 1981 does not prohibit harassment on the basis of race); Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989) (holding that the time to challenge a facially neutral seniority system adopted for discriminatory purposes begins to run at the time the system is adopted); Martin v. Wilks, 490 U.S. 755 (1989) (allowing plaintiffs harmed by an affirmative-action plan contained in a consent decree to bring independent lawsuits challenging the action); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (holding that plaintiffs in disparate-impact cases must prove that the challenged practice does not serve the employer's legitimate interests); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (holding that in mixed-motive cases the employer can avoid liability by proving that it would have taken the same action in the absence of discriminatory motivation).

[29] Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 647 (1989).

[30] These practices included nepotism, a rehire preference, a lack of objective hiring criteria, separate hiring channels, and a practice of not promoting from within. *Id.* at 647-48.

unskilled positions held by nonwhites; most of the noncannery jobs were skilled positions held by whites.[31] To demonstrate the statistical adverse impact, the plaintiffs compared the racial composition of the cannery work force with the racial composition of the noncannery work force.[32] Based upon that comparison, the Court of Appeals for the Ninth Circuit sustained the claims of the cannery workers.[33]

In reversing the Ninth Circuit, the Supreme Court held that comparison of these two components of the employers' work forces was inappropriate.[34] The Court found "nonsensical" the assertion that discrimination in the selection of skilled noncannery workers could be demonstrated by pointing to a high proportion of minorities in the unskilled cannery positions.[35] "Racial imbalance in one segment of an employer's workforce," declared the Court, "does not, without more, establish a prima facie case of disparate impact with respect to the selection of workers for the employer's other positions."[36] Instead, the "proper comparison is between the racial composition of [the at-issue jobs] and the racial composition of the qualified population ... in the relevant labor market."[37]

Between *Griggs* and *Wards Cove,* the level of the Court's scrutiny of practices having a disparate impact varied greatly. In 1975, the Court in *Albemarle Paper Co. v. Moody*[38] applied the Equal Employment Opportunity Commission (EEOC) Guidelines on testing in such a stringent fashion that it was predicted that employers would no longer be able to engage in testing at all. On the other hand, the following year in *Washington v. Davis,*[39] the Court upheld a written test of verbal ability on a much lesser showing, relying in part on the intuitive ground that reading ability is important to the training program and to the job of the police officer.[40] The next year, the Court in *Dothard v. Rawlinson* stated that a

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[31] *Id.* at 647.

[32] *Id.* at 651.

[33] Atonio v. Wards Cove Packing Co., 827 F.2d 439, 444-45 (9th Cir. 1987), *rev'd,* 490 U.S. 642 (1989).

[34] Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 651 (1989).

[35] *Id.*

[36] *Id.* at 653.

[37] *Id.* at 650 (quoting Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308 (1977)). The 1991 Act does not alter the *Wards Cove* holding that a disparity between two segments of an employer's work force does not establish disparate impact.

[38] 422 U.S. 405 (1975).

[39] 426 U.S. 229 (1976).

[40] *Id.* at 254 (Stevens, J., concurring).

practice with a disparate impact "must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge."[41] However, two years after *Dothard,* the Court in *New York City Transit Authority v. Beazer*[42] held that the employer need show only that its "legitimate employment goals ... are significantly served by—even if they do not require" the challenged practice.[43] In sum, the Court had never adopted a monolithic position on the disparate-impact standards.

The case law, then, suggests once more that the extent to which school officials may use tests to evaluate teachers will depend on the rigor with which courts enforce validation standards. Some courts have put some teeth into the validation requirement, while others have essentially ignored it. It does appear that the courts have retreated to some extent from *Albemarle Paper Co.*'s strict application of the EEOC's Uniform Guidelines. However, the validation issue is still of critical legal importance, and school officials must recognize that their use of competency tests to evaluate teachers may be struck down unless serious efforts are made to ensure the validity of the tests. Certainly any school district or state education agency contemplating the use of such testing procedures would be well advised to seek the assistance of professional test developers; "homemade methodology" will not satisfy the courts.[44] On the other hand, the validity of any given test is not guaranteed simply because it is professionally produced and commercially available.[45]

The court in *Groves v. Alabama State Board of Education,*[46] explained the way testing cases are viewed:

> Finally, in wrestling with complex, technical evidence in testing cases, courts should keep in mind that the science of testing is not as precise as physics or chemistry, nor its conclusion as provable. While courts should draw upon the findings of experts in the field of testing, they should not hesitate to subject these findings to the scrutiny of reason.[47]

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[41] *Dothard,* 433 U.S. at 332 n.14.

[42] 440 U.S. 568 (1979).

[43] *Id.* at 587 n.31.

[44] This phrase was used by the plaintiffs, and embraced by the court, in *York,* 581 F. Supp. at 786 n.13.

[45] *See* Gillespie v. Wisconsin, 771 F.2d 1035, 1045 (7th Cir. 1985), *cert. denied,* 474 U.S. 1083 (1986).

[46] 776 F. Supp. 1518 [71 Educ. Law Rep. 150] (M.D. Ala. 1991).

[47] *Id.*

Potential Constitutional Challenges to Teacher Testing

Impairment of Contract

The United States Constitution prohibits states from passing any law "impairing the Obligation of Contracts."[48] It is possible that teachers facing decertification for failure to pass a competency test may challenge such testing requirements on the ground that they impair teachers' contractual rights. Case law, however, suggests that teacher-testing programs probably would survive such a constitutional challenge.

Existence of a Contract

The threshold requirement for success on any contract clause claim is proof of the existence of a contract. If that hurdle is cleared, the next inquiry is whether there has been a "substantial impairment" of the contractual relationship.[49] Most public school teachers, of course, enter into annual employment contracts with their school districts, and there certainly are "contractual" rights and obligations that flow from those contracts. Because these contracts expire at the end of each school term, however, school officials could easily avoid contract clause problems simply by having the dismissal take effect at the end of the academic year after the contract term has expired. As a result, there would be no "impairment" of the contract.

The best hope for teachers, then, would be to base their contract clause challenges either on state tenure laws or on the nature of their teaching certificates. Because state law governs the existence of a contractual obligation, a close examination of the relevant state statutes regarding teacher tenure and certification is essential. Some states purport to grant certain teachers tenure. Others, however, reject any form of tenure system. Similarly, some states issue "life" or "permanent" teaching certificates, while others issue only renewable certificates, which may be renewed if the holder meets certain additional requirements.[50]

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[48] U.S. Const. Art. I, §10, cl. 1.

[49] Energy Reserves Group, Inc. v. Kan. Power and Light Co., 459 U.S. 400, 411 (1983).

[50] *See generally* Comment, *Teacher Competency Testing Decertification: and the Federal Constitution and Title VII,* 37 Emory L.J. 1077, 1103-7 (1988).

Obviously, those teachers who have "tenure" or a "life certificate" will have the strongest claim that a test requirement may impair their contractual rights. But even those teachers will have difficulty prevailing on a contract clause claim. First, it is not at all clear that tenure laws create—or lifetime teaching certificates constitute—a contract between the teacher and the state. In Texas litigation over teacher competency testing, both propositions seem to have been rejected.

In 1984, the Texas legislature amended the Texas Education Code by adding, among other things, section 13.047. That statute requires all public school teachers in Texas to pass the Texas Examination for Current Administrators and Teachers (the TECAT) to retain their certification.[51] Shortly after the law was enacted, the Texas State Teachers Association sued the State, seeking a declaration that the law was unconstitutional. The plaintiff's principal argument was that section 13.047 violated Article I, Section 16 of the Texas Constitution, which, like the contract clause of the United States Constitution, prohibits laws that impair the obligation of contracts.[52] At the heart of the Teachers Association's claim was its assertion that a Texas teacher's certificate, which includes the language "valid for life, unless cancelled by lawful authority," constituted a contract. The trial court denied the requested relief and the Court of Appeals of Texas affirmed. Though the court of appeals did not decide whether a teacher's certificate was a contract, it did express its "doubt" that teachers' certificates fell within the protections of the contract clause.[53]

That unresolved question was answered less than a year later in *State v. Project Principle, Inc.*,[54] when the Supreme Court of Texas addressed a nearly identical challenge to the constitutionality of section 13.047. The plaintiff, a nonprofit corporation with a membership composed of certified public school teachers and administrators, argued that teaching certificates were contracts and that section 13.047 impaired the obligation of those contracts in violation of the contract clause of the state constitution. The Supreme Court of Texas held that the plaintiff had not met the threshold requirement of a contract clause claim—that is, the existence of a contract: "[A] teaching certificate is not a contract ... Rather, the certificate is a license, and like all licenses, is subject to such future restriction the state may reasonably impose."[55]

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[51] Tex. Educ. Code Ann. §13.047 (Vernon Supp. 1987).

[52] *See* Texas State Teachers Ass'n v. State, 711 S.W.2d 421, 423 (Tex. Ct. App. 1986).

[53] *Id.* at 424.

[54] 724 S.W.2d 387 (Tex. 1987).

[55] *Id.* at 390.

The *Project Principle* court relied heavily on a 1937 United States Supreme Court decision in *Dodge v. Board of Education*.[56] In that case, a group of retired teachers in Chicago brought a contract clause challenge to an Illinois act which reduced the amount of their retirement annuities. The Supreme Court rejected the claim, holding that there was no legislative intent to create a contract when the Illinois legislature passed the law providing for such annuities. In its opinion, the Court stated a general "presumption" that a law "fixing the term or tenure of a public officer or an employee of a state agency ... is not intended to create private contractual or vested rights, but merely declares a policy to be pursued until the Legislature shall ordain otherwise."[57] It is this language that the Texas court in *Project Principle* seized upon in rejecting the plaintiff's challenge to the teacher-testing law.

Significantly, the Texas court ignored a Supreme Court opinion decided the year after *Dodge*. In *Indiana ex rel. Anderson v. Brand*,[58] the Court considered the case of a public school teacher who had an "indefinite contract" pursuant to Indiana's Teacher's Tenure Act.[59] The state legislature subsequently repealed that part of the Tenure Act applying to the plaintiff. When her employer threatened to dismiss her, the plaintiff brought suit alleging that the repealing act impaired her indefinite contract and thus violated the contract clause of the United States Constitution. The Supreme Court agreed with her contentions, holding that the Tenure Act did create a contractual obligation that could not be impaired by a repealing statute.

The *Brand* case, then, stands for the proposition that state laws regarding tenure and certification of teachers may create a contractual obligation, in which case state actions adversely impacting one's teaching status (such as decertification as a result of failure of a competency test) could run afoul of the contract clause. *Brand* arguably is more persuasive than the *Dodge* decision relied upon by the Texas court because it dealt with the status of a current teacher rather than the annuities of retired teachers.

The Court's holding in *Brand* was based in large part on the *language* of the Teachers' Tenure Act, which uses the word "contract" several times in defining the tenure status of teachers.[60]

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[56] 302 U.S. 74 (1937).

[57] *Id.* at 79.

[58] 303 U.S. 95 (1938).

[59] The indefinite contract essentially gave the teacher "tenure": her teaching contract could be cancelled only for limited reasons specified in the Tenure Law. *Id.* at 97.

[60] *See id.* at 105.

Therefore, school officials would be well advised to consider the wording of their own tenure and certification provisions before they institute a teacher-testing program. If those provisions are phrased in "contract" terms, a teacher-plaintiff may be able to establish the existence of a contract.

But even if a court accepts the proposition that a teaching certificate is a contract, or that state tenure laws create contractual obligations, the plaintiff still would have to establish that a testing requirement amounts to an "impairment" of the contract. Moreover, despite the literal language of the contact clause, a state may impair contractual obligations if the impairment is reasonably designed to further some important government interest.

Impairment of the Contract

In some circumstances, the "impairment" requirement probably would be satisfied easily. For example, if teachers with life tenure or life certificates were to be decertified for failure to pass a competency exam, it would seem clear that their contractual rights would be impaired (assuming, once again, that there is a contract). On the other hand, would the denial of a pay raise due to a low exam score amount to a significant impairment of a teacher's contract? What is important in this context is the level of the impairment. The United States Supreme Court has made it clear that in contract clause cases, the "severity of the impairment" will determine the "level of scrutiny" to which the state action will be subjected.[61] While the decertification of a tenured teacher presumably would warrant a high level of judicial scrutiny, actions with a lesser impact, particularly those directed toward nontenured teachers, would be entitled to more deference.[62]

In the case, *In re Herrick*,[63] appellants Herrick and Irish attended a court reporting school in Minnesota, which was approved and accredited by the National Court Reporters Association. Both successfully completed their studies and received court-reporting certificates, then moved to Hawaii where they found jobs as shorthand reporters with private reporting companies. They took the Hawaii court reporter examination and did not pass. Pursuant to

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[61] Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 504 n.31 (1987); Energy Reserves Group, Inc. v. Kan. Power Light Co., 459 U.S. 400, 411 (1983).

[62] Georgia, unlike Texas, exempted teachers with life certificates from its competency testing requirement, Ga. Code Ann. §20-2-200(b)(5) (Supp. 1988), and thus far has avoided contract clause challenges.

[63] 82 Haw. 329, 337, 922 P.2d 94_, 950 (1996).

1990 RGCR 11(b), the board issued a temporary court reporter certificate to Herrick and Irish. Both continued to take the examination but were not successful.

When 1990 RGCR 11(b) was repealed in November 1992, Herrick and Irish still had not passed the certification examination. They continued to take the exams, but both failed the May and November tests and therefore did not meet the new rule's November 1993 deadline. Thus, in accordance with the current RGCR 11, the board informed appellants Herrick and Irish that their temporary court reporter certificates lapsed on January 6, 1994. The appellants then asked the board for a special exemption from the current RGCR 11 or for continued temporary certification. The board denied the request in October 1994. Herrick and Irish appealed to the court under RGCR 9(a) from decisions of the Hawaii Board of Certified Shorthand Reporters that denied their requests for a special exemption or temporary certification until they passed the board's examination requirements.

On appeal, Herrick and Irish argued (*inter alia*) that their freelance court reporting services constituted a business enterprise that was entitled to constitutional protection against the impairment of contract, and that the board's decision to recommend repeal of 1990 RGCR 11(b) violated their substantive and procedural due process rights.

In deciding whether a state law has violated the federal constitutional prohibition against impairment of contracts,[64] the court weighed the following three criteria: (1) whether the state law operated as a substantial impairment of a contractual relationship; (2) whether the state law was designed to promote a significant and legitimate public purpose; and (3) whether the state law was a reasonable and narrowly drawn means of promoting the significant and legitimate public purpose.[65]

The court held the threshold question was whether the repeal of 1990 RGCR 11(b) operated as a "substantial impairment" of a contractual relationship.[66] In citing *General Motors Corp. v.*

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[64] U.S. Const., art. I, § 10, cl. 1.

[65] *See* 2 R. Rotunda & J. Nowak, Treatise on Constitutional Law: Substance and Procedure § 15.8, at 454 (2d ed. 1992); *see also* Anthony v. Kualoa Ranch, Inc., 69 Haw. 112, 119-20, 736 P.2d 55, 60 (1987) (analyzing whether a statute violated the contracts clause according to "whether the effect of the statute was a substantial impairment of the complaining parties' rights ... what public policy under the police power was sought to be furthered by [the statute], and whether it changes the contractual and property rights on reasonable conditions and is of a character appropriate to its public purpose").

[66] *See* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244, 57 L. Ed. 2d 727, 98 S. Ct. 2716 (1978).

Romein,[67] the court recognized the inquiry had three components: (1) whether there is a contractual relationship; (2) whether a change in law impairs that contractual relationship; and (3) whether the impairment is substantial.[68]

In determining whether the contract impairment was substantial, the court held the legitimate expectations of the contracting parties must be examined.[69] In addition, other factors that a court must consider included the severity of the impairment and the extent to which the subject matter has been regulated in the past.[70]

Reasonableness of the Impairment

Even if a teacher-plaintiff could clear the first two hurdles in a contract clause challenge by establishing (1) the existence of a contract, and (2) a substantial impairment of that contract resulting from the competency testing program, it is still unlikely that the plaintiff would prevail. That is because the state can justify contract impairment by showing that it is a reasonable means of furthering some important public purpose.

"[I]t is well settled that the prohibition against impairing the obligation of contracts is not to be read literally."[71] Instead, it must be balanced against the state's interest in promoting the general welfare of its citizens. Thus, if the state can show that a "significant and legitimate public purpose" underlies its action, even a substantial impairment may stand.[72]

The purpose underlying a teacher-testing program presumably is to enhance the quality of public education by improving the competency of the teachers who are tested. Surely this is a "significant and legitimate" objective, and courts undoubtedly will have little difficulty justifying testing programs on this basis. The *Texas State Teachers Association* case is a good example. The court in that case assumed for the purpose of argument that the competency testing requirement impaired teachers' contract rights, but easily justified the impairment as incident to the state's valid exercise of its power

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[67] 503 U.S. 181, 186, 117 L. Ed. 2d 328, 112 S. Ct. 1105 (1992).

[68] *Id.*

[69] *See*, Maryland State Teachers Ass'n, Inc. v. Hughes, 594 F. Supp. 1353, 1360 (D. Md. 1984).

[70] Schieffelin & Co. v. Dep't of Liquor Control, 194 Conn. 165, 479 A.2d 1191, 1199 (Conn. 1984) (citing Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 57 L. Ed. 2d 727, 98 S. Ct. 2716 (1978)).

[71] *Keystone Bituminous Coal Ass'n*, 480 U.S. at 502.

[72] *See id.* at 1251-52; *Energy Reserves Group*, 459 U.S. at 410-412; *Texas State Teachers Ass'n*, 711 S.W.2d at 424.

to regulate the teaching profession and to establish and maintain a public school system.[73]

A Connecticut case is also instructive, although it did not deal specifically with competency testing. In *Connecticut Education Association, Inc. v. Tirozzi*,[74] plaintiffs challenged a state statute that invalidated all permanent teaching certificates and substituted in their place five-year certificates renewable upon successful completion of continuing education units. In reviewing this statute, the Supreme Court of Connecticut found no need to determine whether the first two requirements of a contract clause claim were satisfied. The court held that even if it were to conclude that the statute substantially impaired the plaintiffs' contractual relationships, "the act has the significant, legitimate purpose of upgrading the state's public education system."[75]

Though it will not be difficult to identify a legitimate public purpose underlying a teacher-testing program, a caveat is in order: "the finding of a significant and legitimate public purpose is not, by itself, enough to justify the impairment of contractual obligations."[76] The impairment also must be *reasonable*, and it must truly serve the public purpose it is intended to serve. In view of the courts' traditional deference to the judgment of state officials as to "the necessity ad reasonableness of a particular measure,"[77] it may well be that this requirement is not a serious impediment. However, the issue of test validity again must be considered. If school officials are evaluating teachers on the basis of a competency exam that has not been properly validated, a strong argument could be made that such testing requirements are not *reasonably designed* to achieve the broader policy goal of improving the public education system.

In the final analysis, contract clause challenges to teacher-testing programs appear destined to fail. Even if courts are willing to find the existence of contractual obligations (which, in light of the Texas experience, is questionable), the important public purpose underlying such testing programs—improving the quality of public education—probably will be enough to justify any impairment that occurs.

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[73] 711 S.W.2d at 425.

[74] 554 A.2d 1065 (Conn. 1989).

[75] *Id.* at 1074.

[76] *Keystone Bituminous Coal Ass'n*, 480 U.S. at 505.

[77] *Id.*

Procedural Due Process

The United States Constitution prohibits states from depriving any person of "life, liberty, or property without due process of law."[78] To establish a procedural due process violation, a plaintiff must first show that he or she has a protected liberty or property interest. Once that has been shown, "the question remains what process is due";[79] that is, what procedures are necessary to ensure "due process of law." In the context of teacher competency testing, there may be strong arguments that a teacher's interest in continued certification and employment implicates both liberty and property interests. Therefore, school officials contemplating the use of a teacher-testing program must strive for basic fairness in the procedures by which the program is administered.

Liberty Interest

In *Board of Regents v. Roth*,[80] the United States Supreme Court considered the procedural due process challenge of a nontenured university professor who was informed that he would not be rehired for the following academic year. The university gave the professor no reason for its decision and no opportunity to challenge the decision at any sort of hearing. The Court stated that the range of "liberty" interests protected by the due process clause was "broad indeed." However, without some evidence that the professor's "good name, reputation, honor, or integrity" had been impugned, or that the university's decision not to reemploy the professor "imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities," the professor could not establish a protected liberty interest.[81]

It is unlikely that a teacher challenging a competency test could establish a liberty interest based on the first of the *Roth* alternatives. An adverse employment decision grounded solely on the teacher's failure to pass a competency test does not call into question a teacher's "good name, reputation, honor, or integrity," at least as contemplated by *Roth*.[82] Moreover, many courts have held that even termination does not constitute a deprivation of an employee's "liberty" unless the employer publicly discloses the rea-

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[78] U.S. Const. amend. XIV, §1.

[79] Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

[80] 408 U.S. 564 (1972).

[81] *Id.* at 572-73.

[82] *Id.* at 573 & n. 12.

sons for the dismissal.[83] Therefore, school officials could avoid this type of due process challenge simply by refusing to publicize the reasons for an individual's termination.

Roth's second alternative warrants further scrutiny. In determining whether one has a liberty interest, the focus is not on whether an employee has the right to continue in his or her present position, but whether the employee has the freedom to seek other suitable employment. And in the view of the Court in *Roth*, "It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another."[84] However, a teacher who is decertified for failure to pass a competency exam is not as "free as before" to seek another teaching job. Because certification generally is a prerequisite for any public teaching position, a teacher who is decertified for failing a mandatory competency test will be unable to seek similar employment within the state. Moreover, even if the teacher had the freedom to move to another state, he or she probably would be faced with the prospect of having to pass a similar competency test in a new state, since most states now require passage of such a test for initial certification purposes.[85]

It is entirely possible, then, that a teacher who is adversely affected by a testing requirement could establish a liberty interest sufficient to invoke procedural due process, at least if the test results are used for the purpose of decertification rather than some milder employment action such as denial of a pay raise.

Property Interest

A teacher challenging a competency test on procedural due process grounds may be more successful establishing a property interest than a liberty interest. To have a protected property interest in some benefit (such as continued employment), one must have "a legitimate claim of entitlement" to it.[86] That claim of entitlement must derive from some source independent of the Constitution, such as a written or implied contract, a state statute, a local ordinance or rule, or some "mutually explicit understanding" between the relevant parties.[87]

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[83] *See e.g.*, Bishop v. Wood, 426 U.S. 341, 348 (1976); Dickeson v. Quarberg, 844 F.2d 1435, 1440 (10th Cir. 1988); Lee v. W. Reserve Psychiatric Habilitation Ctr., 747 F.2d 1062, 1069 (6th Cir. 1984); Goetz v. Windsor Cent. Sch. Dist., 698 F.2d 606, 610 (2d Cir. 1983).

[84] 408 U.S. at 575.

[85] *See* Comment *supra* note 40, at 1085-86.

[86] *Roth*, 408 U.S. at 577.

[87] *See id.*, Perry v. Sindermann, 408 U.S. 593, 601 (1972).

In *Roth*, the case in which the Supreme Court first set forth the above standard, the Court held that a nontenured university professor did not have a protected property interest in continued employment. He had been hired specifically for a one-year term, and there was nothing in his notice of appointment, any state statute, or any university rule or policy to suggest that the plaintiff would be rehired for another term. Thus, the professor had "no possible claim of entitlement to re-employment," and the university was not required to give him a hearing when it decided not to renew his contract.[88]

The Court in *Roth* implicitly suggested that a tenured teacher would always be entitled to procedural due process prior to termination or decertification, a stance reaffirmed in the companion case of *Perry v. Sindermann*.[89] The *Perry* Court also made clear, however, that under certain circumstances even nontenured teachers might have the same claim of entitlement. The policies and practices of school may effectively create a "de facto tenure program"—that is, "an unwritten 'common law' ... that certain employees shall have the equivalent of tenure."[90] In *Perry*, for example, the plaintiff had been a teacher in the Texas state college system for ten years, under a series of one-year contracts. Even though his latest employer did not have a formal tenure system, the plaintiff claimed reliance on certain college and state guidelines, which suggested that a teacher in the plaintiff's position should enjoy the benefits of tenure. The Supreme Court agreed with the plaintiff that if he could prove the existence of such "rules and understandings, promulgated and fostered by state officials," he could establish a legitimate claim of entitlement to continued employment.[91]

The Court also has held that the existence of state statutes listing specific reasons for which a public employee may be dismissed may be enough to create a property interest. In *Cleveland Board of Education v. Loudermill*,[92] the Court considered the due process challenge of a school security guard who was terminated for dishonesty in filling out his employment application. The guard was given no opportunity to respond to the charge, nor was he granted any kind of hearing prior to his dismissal. In addressing the "property interest" issue, the Court concluded that the relevant Ohio statute "plainly create[d] such an interest" in the plaintiff because it specifically set forth the ground for a dismissal: such an

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[88] 408 U.S. at 578.

[89] 408 U.S. 593, 601 (1972).

[90] *See id.* at 600-02.

[91] *Id.* at 602.

[92] 470 U.S. 532 (1985).

employee could be dismissed for "incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such section or the rules of the director of administrative services or the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office."[93]

Connecticut Education Association, Inc. v. Tirozzi[94] also provides a good example of a state-created property interest in a teaching certificate. In that case, the Supreme Court of Connecticut held that the rights of public school teachers in their teaching certificates constitute protected property interests because a Connecticut statute declares that a teacher's certificate can be revoked only "for cause." Even thought the types of "cause" justifying a dismissal were not set forth in detail as they were in *Loudermill*, the statutory language was enough to invoke the Due Process Clause: "A teacher who is given by statute the right to continued employment except upon a showing of cause ... acquires a property right that is entitled to protection under the due process clause."[95]

Project Principle is the only teacher-testing case to date that has specifically included a procedural due process challenge. The Supreme Court of Texas addressed the procedural protection available to teachers facing decertification for failure to pass the TECAT and concluded that such teachers were afforded procedural due process.[96] The court did not explicitly address the antecedent issue of whether these teachers possessed a protected property interest. Its analysis, however, seems to assume such a property interest does exist. It is interesting to note that Texas, like Connecticut and many other states, lists specific reasons in its statutes for the revocation of a teaching certificate.[97]

It seems likely, then, that many teachers whose certification is threatened by a mandatory competency test would be able to establish a property interest sufficient to support a procedural due process challenge. Certainly tenured teachers have a property interest in continued employment. Nontenured teachers similarly would have a property interest in their yearly employment contracts, so they would be entitled to procedural due process with respect to actions taken during their contract terms. And even if no adverse action is taken until after the contract term expires, the nontenured teacher may be able to establish a property interest

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[93] *Id.* at 538-39 & n.4.

[94] 554 A.2d 1065 (Conn. 1989).

[95] *Id.* at 1070 (quoting Lee v. Bd. of Educ., 434 A.2d 333 (Conn. 1980)).

[96] *See* 724 S.W.2d at 391.

[97] *See* Tex. Educ. Code Ann. §13.046 (Vernon Supp. 1967).

based on statutory language, local policies, or mutual "understandings" between teacher and employer. School officials must be aware of all these potential sources from which a property interest may emanate and realize that they may suffer the consequences if they "lead on" nontenured employees and then pull the rug out from under them through the use of the competency test.

What Process Is Due?

The conclusion that a teacher-plaintiff has a constitutionally protected liberty or property interest does not, of course, establish a due process violation. "[T]he question remains what process is due."[98] In other words, even if a teacher establishes a liberty or property interest, that does not mean the teacher cannot be terminated for failure to pass a competency examination. It simply means that school officials must afford the teacher some procedural protections prior to dismissal.

What constitutes "due process" will vary depending on the factual setting. However, the "root requirement" of the Due Process Clause is that individuals be given notice and "some kind of a hearing" before they are deprived of significant liberty or property interests.[99] Success on a procedural due process claim, then, will depend on the court's vision of the "notice and hearing" requirement.

The notice aspect has yet to be specifically addressed in the context of dismissal of a teacher for failure to pass a competency exam, but an analogy may be drawn to the area of student competency testing. In *Debra P. v. Turlington,*[100] a group of Florida high school students brought suit challenging the constitutionality of a functional literacy examination which students were required to pass before they could receive a high school diploma. The Fifth Circuit first held that the students' expectation that they would receive a diploma upon successful completion of their high school coursework was a protected property interest. It then went on to find that "the abrupt [testing] schedule" imposed on current high school students acted as a "deprivation of property rights without adequate notice."[101] The court upheld the trial court's injunction against use of the test for four years, to give the students an adequate period of time to orient themselves to the new testing requirement and to prepare for the exam.

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[98] *Loudermill*, 470 U.S. at 541 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

[99] *See Loudermill*, 470 U.S. at 542.

[100] 644 F.2d 397 (5th Cir. 1981).

[101] *Id.* at 404.

Surely the notice aspect of the due process requirement is equally applicable to the competency testing of teachers. Current teachers must have adequate notice of testing requirements so they will have sufficient lead time to prepare for the examination.

An estimate of the exact time period a court may require in any given case would be speculative at best, but one should recognize that the four-year notice period mandated in *Debra P.* for student competency testing does not necessarily carry over to teacher-testing programs. As one pair of commentators has suggested, currently employed teachers may, "by virtue of their employment, be presumed to have attained at least threshold levels of competency, whereas students are more easily viewed as still in the process of fulfilling the requirements for minimal competency."[102] Therefore, teachers may not need as much preparation time as students.

The length of the notice period may be influenced by the other procedural protections afforded under the testing program. In other words, if state legislators or school officials include additional procedures in their programs to ensure that teachers will not be unfairly evaluated, they may be able to avoid due process problems even if the notice period is relatively short. For example, one of the factors that was important to the eventual decision in *Debra P.* to sustain the validity of the student competency test itself was the opportunity for the students to retake the exam after they failed it initially.[103]

That same factor has played a significant role in teacher-testing cases. The Texas Supreme Court in *Project Principle* rejected the plaintiff's procedural due process challenge in part because the statute provided that "each teacher must be given more than one opportunity to perform satisfactorily" on the TECAT.[104] Similarly, in *Alba v. Los Angeles Unified School District*,[105] a group of probationary teachers challenged a school district requirement that they pass the district's secondary social studies subject field examination as a condition of continued employment. The California Court of Appeal upheld the use of the exam, noting that each of the plaintiffs had more than one opportunity to pass the test and none of them was prevented from retaking the test in the future.[106]

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[102] Swiger & Zehr, *supra* note 84, at 753.

[103] Debra P. v. Turlington, 564 F. Supp. 177, 185 (M.D. Fla. 1983) (students given five chances to pass exam between tenth and twelfth grades), on remand from 644 F.2d 397 (5th Cir. 1981).

[104] *See* 724 S.W.2d at 391; Tex. Educ. Code Ann. §13.047 (f) (Vernon Supp. 1987). The Georgia testing statute provides that a teacher "shall have at least three opportunities" to pass the competency test. Ann. §20-2-200(b)(4) (Supp. 1987).

[105] 189 Cal. Rptr. 897 (1983).

[106] *Id.* at 1006, 189 Cal. Rptr. at 903.

Another important factor to be considered in conjunction with a retesting procedure, is the opportunity for a teacher who fails a competency test to obtain remedial help to correct deficiencies. Again, this was important to the *Debra P.* court in the student-testing context,[107] and it has been recognized in state statutory testing programs. For example, the Georgia statute specifically states that a current teacher who fails a competency test "may request and thereby shall be provided staff development assistance in the areas of identified deficiencies."[108] Arkansas likewise provides for an opportunity to participate in remedial programs.[109] The original Texas statute required remedial aid, but that provision was repealed in 1987.[110]

School officials should also be aware of another notice-related issue that has arisen in the teacher-testing context. Part of the plaintiff's complaint in the *Alba* case was that the school district provided a misleading description of the test that was to be administered, and therefore the teachers had no fair notice of the subject areas on which they would be tested. The district's description of the social studies exam stated that it covered "United States history, government, and geography, world history and geography, economic, international relations and current affairs, and methods and techniques of teaching social science." When the test was actually administered, however, it did not include any questions regarding "current affairs" or "methods and techniques of teaching social science." That discrepancy was enough for the trial court to find the school district's action "arbitrary and capricious," and to order the district to set aside its decision dismissing the plaintiffs. The court agreed with the findings of an administrative law judge that the teachers "could not have effectively and competently prepared for the examination and may have spent a disproportionate amount of time studying areas in which no questions were asked."[111] On appeal, however, the California Court of Appeals reversed the trial court, finding no evidence that the plaintiffs relied on the examination description or would have passed if all listed subject areas had been included in the exam.[112]

Despite the ultimate victory for the school district in *Alba*, the lesson remains that school officials contemplating the use of a teacher competency test may face a legal challenge if they do not

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[107] *See* 564 F. Supp. at 185 (noting that students who fail the exam may stay in school and receive "special instruction").

[108] Ga. Code Ann. §20-2-200(b)(4) (Supp. 1987).

[109] Ark. Code Ann. §6-17-601 (1987).

[110] 1987 Tex. Sess. Law Serv. 134 (Vernon).

[111] 189 Cal. Rptr. at 899-902.

[112] *See id.* at 1005-06, 189 Cal. Rptr. at 902-03.

provide sufficient advance information regarding the test to allow teachers to prepare effectively. Accurate and complete information, together with an adequate time period for preparation and opportunities for retesting and remedial assistance, will go far toward avoiding procedural due process claims.

School officials would also be well advised to provide teachers with the opportunity for "some kind of hearing" prior to dismissal or decertification for failure to pass a competency exam. Most states already have laws governing the procedural protection to be afforded public employees aggrieved by some state action. In the *Project Principle* case, for example, the court noted that under the Texas Administrative Code, a teacher who is decertified for failure to pass the TECAT is entitled to an administrative appeal to the state commissioner of education, followed by judicial review in a district court. The court concluded that "[t]his review provides procedural due process to any teacher who fails to perform satisfactorily on a competency examination."[113]

The "hearing" provided to the teacher need not be elaborate, but it should at least give the teacher an opportunity to be heard prior to dismissal. As the Supreme Court stated in *Loudermill*, "The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement."[114] It may well be that in the competency testing context the only issue for a hearing would be the correct scoring of the exam. If that is the case, it is doubtful that the hearing would be of much practical value.[115] On the other hand, the hearing may provide the teacher with an opportunity to challenge the validity of the exam or the conditions surrounding the administration of the exam, in which case the opportunity to be heard may be of considerable importance.

One final comment regarding procedural due process is in order. The above discussion focused on due process challenges grounded in the United States Constitution. School officials also must be aware of the procedural protections afforded under state and local laws. For example, in a recent Georgia case, the court reinstated a provisionally certified teacher who had been decertified for failure to pass a competency exam because the testing requirement was not enacted in accordance with the state's Administrative Procedure Act.[116] Similarly, the Texas teacher competency

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[113] 724 S.W.2d at 391.

[114] *See* 470 U.S. at 545-46.

[115] *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

[116] Department of Educ. v. Kitchens, 193 Ga. App. 229, 387 S.E.2d 579 (1989), *cert. denied*, 259 Ga. 791, 389 S.E.2d 244 (1990).

exam was challenged on the ground that it tested only literacy, while the statute authorizing the exam contemplated testing of both literacy and subject area knowledge. Thus, it was argued, not teacher could be decertified solely for failure to pass a literacy test.[117]

Substantive Due Process

"[T]he Due Process Clause of the Fourteenth Amendment not only accords procedural safeguards to protected interests, but likewise protects substantive aspects of liberty against impermissible governmental restrictions."[118] Therefore, it is possible that a teacher whose employment status is adversely affected due to failure of a competency exam may challenge the testing program on substantive due process grounds, even though the teacher has been afforded all necessary procedural protections. As long as the competency test has been properly validated, however, it is unlikely that such a challenge would succeed.

Under traditional substantive due process analysis, the only government actions to receive serious judicial scrutiny are those that impact on a person's "fundamental rights." If fundamental rights are not implicated, the government action will be upheld as long as it is rationally related to some legitimate government interest.[119] Those rights that have been recognized by the courts as "fundamental" are very limited, and they will not be implicated in a teacher-testing case. In *Harrah Independent School District v. Martin*,[120] the United States Supreme Court considered the case of a tenured teacher who was dismissed for refusing to complete required continuing education credits. The Court held that the teacher's interest in continued employment did not involve a fundamental right and, applying the "rational relationship" standard to the school district's action, rejected the teacher's substantive due process claim.

Teacher-testing programs likewise will be judged on the basis of this deferential standard. Such programs will be presumed valid, so the burden will be on the teacher to show that there is no rational relationship between the test and some legitimate government interest. There can be no doubt that a legitimate objective—improving the quality of public education by ensuring the competency

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[117] 724 S.W.2d 387 (1987).

[118] Harrah Indep. Sch. Dist. v. Martin, 440 U.S. 194, 197 (1979).

[119] *See generally* J. Nowak, R. Rotunda & J. Young, Constitutional Law §11.4, at 351-59 (3d ed. 1986).

[120] 440 U.S. 194 (1979).

of teachers—underlies the use of competency tests. Therefore, any hope of success for a teacher-plaintiff must rest on an argument that the competency test being used is not rationally designed to achieve that concededly legitimate objective. In other words, the school officials' use of the test is so irrational or "arbitrary" that it violates the fundamental fairness standard embodied in the Due Process Clause.[121]

It may well be that the teacher's burden is insurmountable, particularly in light of the deference courts accord educational policymakers. Certainly the courts that have considered substantive due process claims in the context of teacher testing have dismissed such claims with little effort. In *Project Principle*, for example, the Supreme Court of Texas rejected the plaintiff's substantive due process claim with a single sentence: "teacher testing is a rational means of achieving the legitimate state objective of ensuring that public school educators meet specified standards of competency."[122] In a related context, the Supreme Court of Connecticut, reviewing legislation that required teachers to give up their "permanent" teaching certificates in exchange for five-year certificates renewable on completion of continuing education courses, rejected the plaintiffs' substantive due process challenge with the simple statement that it was not arbitrary or irrational for the Connecticut legislature to try to improve the quality of the state's educational system by requiring even permanent teachers to sharpen their educational skills.[123]

School officials should not, however, feel completely shielded from substantive due process claims. If courts consider the validity of the tests being used (an issue not addressed in *Project Principle*), testing programs may be vulnerable even under the rational relationship standard. Some courts have recognized that if a test is invalid, it will not be "rationally" related to the goal of improving teacher competency. In *United States v. South Carolina*,[124] for example, the court upheld the use of the National Teacher Examinations for determining salaries of current teachers. It did so, however, only after considering whether the exams themselves bore "a

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[121] *See* Debra P. v. Turlington, 644 F.2d 397, 404 (5th Cir. 1981).

[122] 724 S.W.2d at 391. *See also* Newman v. Crews, 651 F.2d 222, 225-26 (4th Cir. 1981) (rejecting due process challenge to use of NTE for salary determinations); United States v. South Carolina, 445 F. Supp. 1094, 71107-09 (D.S.C. 1977) (same), *aff'd mem.*, 434 U.S. 756 (1978).

[123] Connecticut Educ. Ass'n, Inc. v. Tirozzi, 554 A.2d 1065, 1072 (Conn. 1989).

[124] 445 F. Supp. 1094 (D.S.C.) *aff'd mem. sub nom* National Educ. Ass'n v. South Carolina, 434 U.S. 1026 (1978).

fair and substantial relationship" to the objective of improving the quality of public school teaching.[125]

The central importance of the validity of the testing device then is apparent in the substantive due process analysis. School officials once again must make every effort to ensure that the tests being used measure what they are intended to measure. Even with that caveat, however, substantive due process challenges are likely to fail. Most courts will defer to the judgments of school officials in their testing efforts. Certainly the *South Carolina* court did not impose strict validation standards. Indeed, the court even suggested that the validity of a test should be balanced against its cost-effectiveness, thereby putting its imprimatur on the use of a nationally distributed, commercially available test.[126] If that opinion is any indication, it seems unlikely that a court would find a school district's use of a particular competency test to be arbitrary and irrational.

Equal Protection

The Equal Protection Clause of the Fourteenth Amendment prohibits states from denying to any person within their jurisdiction "the equal protection of the laws."[127] Essentially, this mandates that "all persons similarly situated should be treated alike."[128] Several challenges to teacher-testing requirements have been made pursuant to the Equal Protection Clause, on the theory that such tests unconstitutionally classify those who fail the tests differently from those who pass the tests. Few such challenges, however, have been successful, and it is unlikely that equal protection claims will fare any better than other constitutional claims.

In general, equal protection claims are judged on the same basis as substantive due process claims—that is, the state action is presumed to be valid and will be sustained as long as the resulting classification is rationally related to a legitimate government interest.[129] As suggested, few testing programs would seem to be vulnerable under such a deferential standard. The Texas court in *Project Principle*, for example, had as little difficulty disposing of

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[125] *See* 445 F. Supp. at 1108 (noting that there was "ample evidence" in the record of the content validity of the NTE).

[126] *See id.* at 1109 & n.14 (referring to the NTE as a "reliable and economical means for measuring ... effective teaching," and asserting that the state had a duty to provide its public school students with the best available teacher "in keeping with *its financial ability to do so*") (emphasis added).

[127] U.S. Const. amend. XIV, §1.

[128] City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985).

[129] *Id.* at 440.

the plaintiff's equal protection claim as it did its substantive due process claim. After determining that the "rational basis" standard applied, the court's analysis once again consisted of a single sentence: "competency testing bears a rational relation to the legitimate state objective of maintaining competent teachers in the public schools."[130]

Again, however, teacher-testing programs are still open to attack if they have not been properly validated. As the court in *Debra P.* stated in considering an equal protection challenge to a student competency test, "If the test is not fair, it cannot be said to be rationally related to a state interest."[131] Several courts have recognized the importance of test validity when addressing equal protection claims, and school officials must recognize it as well. Although most courts (assuming they even consider the test validity issue) probably will view testing programs as deferentially as did the court in *South Carolina*, at least two federal courts have struck down teacher-testing programs as violative of the Equal Protection Clause. In both cases, the courts held that the tests were not rationally related to the purpose for which they were being used.

In *Armstead v. Starkville Municipal Separate School District*,[132] the Fifth Circuit considered a school board requirement that incumbent teachers achieve a certain score, or rank in the fiftieth percentile or higher, on the Graduate Record Examination (GRE) to retain their employment. The court first noted that the GRE was "designed to assist graduate schools in the selection of students for graduate study ... not ... for the purpose of identifying those who are or will be competent teachers at the primary and secondary level." It then observed that neither the test developers nor the school district had conducted any validation studies to demonstrate a correlation between high GRE scores and teacher competency. As a result, even though the school board's "desire to employ the best teachers available [was] both legitimate and commendable," its use of the GRE was not rationally related to achieving that objective.[133]

Similarly, in *Georgia Association of Educators, Inc. v. Nix*,[134] a federal district court held that Georgia's use of a minimum score on the NTE as a prerequisite for a six-year teaching certificate (which carried with it a higher salary than that associated with other types of certificates) created an arbitrary classification in vio-

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[130] 724 S.W.2d at 391.

[131] 644 F.2d at 406.

[132] 461 F.2d 276 (5th Cir. 1972).

[133] *Id.* at 279.

[134] 407 F. Supp. 1102 (N.D. Ga. 1976).

lation of the Equal Protection Clause. The same defects noted in *Armstead* also existed in the Georgia case: the NTE was designed to measure the academic background of prospective teachers, not to test the job performance of current teachers, and the defendants had made no attempt to validate the use of the NTE with respect to assessing teacher competency.[135]

The lesson of these two cases, once again, is to pay attention to the test validation issue. Despite the admirable goal of improving the quality of teachers, some courts may demand substantial validation efforts. As a reminder, school officials might keep in mind the pointed observation of the court in *Georgia Association of Educators*:

> Defendants apparently feel that the existence of a valid stated purpose for the [test] is all that is necessary to justify its use. They have totally failed to come to grips with the fact that if a test in no way accomplishes that purpose or is in no way related to that purpose, then the use of the test is improper.[136]

Nonetheless, the holdings in *Armstead* and *Georgia Association of Educators* are rarities. Most state action is upheld under a rational relationship standard, and therefore teacher-plaintiffs will strive to convince courts to subject testing requirements to heightened scrutiny. Under traditional equal protection principles, a "strict scrutiny" analysis (in which state action will be upheld only if it is narrowly tailored to serve a compelling state interest) applies only if the challenged action interferes with a "fundamental right" or discriminates against a "suspect class."[137]

Neither of these conditions is likely to be met in a teacher-testing case. As noted above, the Supreme Court has held that even a tenured teacher's interest in continued employment does not involve a fundamental right.[138] The same issue arose in the *Project Principle* case. In challenging the TECAT on equal protection grounds, the plaintiff teachers' organization argued that strict scrutiny was applicable because the classification (of those who failed the test versus those who passed) impinged on a fundamental right and sustained the TECAT under a rational basis standard.[139]

In several cases, plaintiffs have argued for strict scrutiny of teacher-testing programs on the ground that they discriminate

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[135] *See id.* at 1108.

[136] *Id.* at 1107 n.3.

[137] *See* Kadrmas v. Dickinson Pub. Schs., 108 S. Ct. 2481, 2487 (1988).

[138] *See supra* text accompanying notes 103-04.

[139] 724 S.W.2d at 391.

against racial minorities. It is well established that many competency tests have had a disproportionate impact on minorities,[140] and there is no question that classifications based on race are "suspect." However, competency tests are not discriminatory on their face, and the United States Supreme Court has made it clear that to prevail on such an equal protection claim a plaintiff must prove the defendant acted with an intent to discriminate.[141] In other words, a disproportionate racial impact, standing alone, will not establish a constitutional violation; there must be a discriminatory purpose underlying the state action.

One would certainly hope that school officials, in implementing a competency testing program, would be motivated solely by a desire to improve the quality of teaching, not to minimize the number of minority teachers in a school system. Unfortunately, that has not always been the case. In *Baker v. Columbus Municipal Separate School District*,[142] the Fifth Circuit found that the school district's use of the NTE for hiring and retaining teachers violated the Equal Protection Clause because the district "acted with the purpose of barring proportionately more black teachers than white teachers from employment and re-employment."[143]

In most teacher-testing cases it will be very difficult for a plaintiff to prove discriminatory intent. Nonetheless, school officials contemplating the use of a testing program must be sensitive to the discrimination issue and make every effort to reduce any disproportionate impact resulting from such programs. Not only will it help them avoid Title VII challenges (addressed below), but also it will forestall attempts to prove discriminatory intent in an equal protection case. One must realize that a plaintiff bringing an equal protection claim need not have direct evidence of discriminatory intent; a court may infer such intent from circumstantial evidence. And the Supreme Court has held that a racially discriminatory *impact* may provide "an important starting point" in determining whether a discriminatory purpose motivated the defendants' actions.[144]

One way to help guard against equal protection claims is to ensure the representation of minority interests in the planning process prior to implementation of a testing program. For example, in upholding the use of a teacher competency test in *Alba v. Los Angeles Unified School District*, the California Court of Appeals

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[140] *See infra* text accompanyingt notes 133-60.

[141] *See* Washington v. Davis, 426 U.S. 229, 244-45 (1976).

[142] 462 F.2d 1112 (5th Cir. 1972).

[143] *Id.* at 1115.

[144] Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

specifically noted that in assembling a committee to formulate the test, "Efforts were made to establish a male-female and ethnic balance on the committee, as well as representation of a geographical area within the District."[145] Similarly, in *Allen v. Alabama State Board of Education*,[146] the court considered a race discrimination claim brought against the Alabama Initial Teacher Certification Testing Program, which tested prospective teachers. The court's opinion focuses on the parties' settlement agreement, which provided for the appointment not only of a panel "to judge the racial effect" of the exam, but also of "panels of black Alabama educators" to review the exam for "racial bias."[147] Similar advance planning, with sensitivity toward minority concerns, could help other school officials avoid accusations of race discrimination.

The bottom line is that equal protection challenges to teacher-testing programs are likely to fail. No "fundamental rights" are involved, and it will be very difficult for a plaintiff to prove that a discriminatory intent motivated the testing decision. As a result, testing programs will be judged under the deferential rational relationship, under which the burden falls on the plaintiff to show the absence of a rational relationship between the competency test and the legitimate interest in improving teacher quality. As long as a reasonable effort has been made to validate the test, this burden on the plaintiff will be onerous indeed.

Testing and Discrimination

A teacher-testing program that impacts disproportionately on some identifiable group is susceptible to charges of discrimination. Several federal statutes address employment discrimination generally. Therefore, in addition to the potential constitutional challenges to competency tests, a teacher may assert a statutory claim based on allegations of discrimination. The most common statutory challenge has been one based on the Title VII of the Civil Rights Act of 1991, but other statutes may come into play as well.

Title VII: Racial Discrimination

Title VII of the Civil Rights Act of 1991 prohibits employers from discriminating against employees on the basis of their race,

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[145] 160 Cal. App. 3d 997, 1000, 189 Cal. Rptr. 897, 899 (1983).

[146] 612 F. Supp. 1046 (M.D. Ala. 1985), *vacated on reh'g on other grounds*, 636 F. Supp. 64 (M.D. Ala. 1986), *rev'd*, 816 F.2d 575 (11th Cir. 1987).

[147] 612 F. Supp. at 1052-53.

color, religion, sex, or national origin.[148] No sex discrimination claims have been made against teacher-testing programs, presumably because there is no evidence that members of one sex fail the test appreciably more than members of the other. Claims of racial discrimination, however, have been prevalent, and it is this area in which school officials must exercise considerable caution in administering competency tests.

There are two basic models for addressing claims of discrimination: disparate treatment and disparate impact. The disparate treatment model attempts to expose and punish intentional discrimination. Under this model, proof of discriminatory motive is critical.[149] Thus, a plaintiff in a disparate treatment case must demonstrate that the defendant treated him or her differently from other similarly situated individuals "because of" race, sex, national origin, or other protected status.[150]

By contrast, the disparate impact model seeks to eliminate policies that, while neutral on their face, disproportionately harm members of a particular protected class.[151] Under the disparate impact approach, proof of the defendant's state of mind (i.e., illicit motive) is not required.[152] Congress in the original Civil Rights Act of 1964 did not sanction the disparate impact model of discrimination. Rather, it has been adopted piecemeal by administrative agencies[153] and federal courts[154] seeking to extend the law's reach.[155]

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[148] Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in sections of 42 U.S.C.A., 2 U.S.C.A., 16 U.S.C.A. and 29 U.S.C.A.).

[149] International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) ("[Disparate treatment occurs where the defendant] simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.").

[150] In cases of employment discrimination, motive can be proved by way of direct evidence or proof of pretext. *See* Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-56 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805, n.18 (1973) (outlining the burdens of proof in a disparate treatment case under Title VII).

[151] *See International Bhd. of Teamsters*, 431 U.S. at 335-36 n.15 (the disparate impact model of discrimination prohibits the use of "practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity").

[152] *International Bhd. of Teamsters*, 431 U.S. at 335-36 n.15 (stating that in the law of disparate impact, "proof of discriminatory motive ... is not required").

[153] *See, e.g.*, 34 C.F.R. 100.3(b)(2) (2001) (applying the disparate impact model of discrimination to claims against recipients of federal funds under Title VI of the 1964 Civil Rights Act).

[154] *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971) (sanctioning the use of the disparate impact model in employment cases under Title VII of the 1964 Civil Rights Act).

[155] In 1991, after a series of court decisions curbed the application of the disparate

Disparate Impact

A disparate impact claim under Title VII is directed toward an employment practice that is facially neutral in its treatment of different groups of employees, but in fact impacts more harshly on one group than another. Teacher-testing programs often fit within this category. Certainly they are neutral on their face—no racial group is explicitly singled out for differential treatment. However, a litany of cases can be recited in which testing programs have had a disproportionate impact on minorities.

In *Baker v. Columbus Municipal Separate School District*,[156] the school district required new teachers to attain a minimum score on the NTE to keep their positions. Of eighteen black teachers who were required to take the test, only one achieved the minimum score. On the other hand, sixty-four of seventy-three white teachers met the requirement.[157] The same school district had used the NTE in prior years to determine which teachers were entitled to merit pay increases, with the same racially disproportionate results.[158]

Newman v. Crews and *United States v. South Carolina*[159] also involved the use of the NTE for determining pay raises. Teachers were placed in different classifications, with varying salary levels, depending on their NTE scores. In *Newman*, 2 percent of the white teachers in the district were denied pay raises based on their classification, while 38.6 percent of the black teachers received no raise. Studies in the *South Carolina* case indicated that 90 percent of the white teachers in the state, and only 27 percent of the black teachers, would qualify for the top two salary classifications.[160] The court in the latter case also considered the use of the NTE for screening prospective teachers, and found that the minimum score required for initial certification eliminated approximately 41 percent of the

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impact model in employment discrimination cases, Congress passed the Civil Rights Act of 1991, which amended Title VII to provide explicitly for lawsuits based on the disparate impact model.

[156] 462 F.2d 1112, 1113 (5th Cir. 1972).

[157] *Id.*

[158] During the first year of the NTE's use in the merit pay program, 20% of the black teachers tested achieved the minimum score compared to 96% of the white teachers. In the second year, the percentages were 14% and 87%, respectively, and in the third year, 53% of the black teachers and 95% of the white teachers met the merit pay standard. *Id.* at 1114. The school district's knowledge of this disparate impact in the merit pay program supported the court's finding that a discriminatory purpose motivated the district's use of the NTE for retention of new teachers. *See id.*

[159] 651 F.2d 222, 224 (4th Cir. 1981).

[160] 445 F. Supp. 1094, 1102 (D.S.C. 1977), *aff'd mem.*, 434 U.S. 1026 (1978).

graduates of "predominantly black" colleges and less than 1 percent of the graduates of "predominantly white" colleges.[161]

Allen v. Alabama State Board of Education[162] is a recent class action lawsuit in which the class consists of all black persons who have been or will be denied any level teaching certificate because of their failure to pass the tests administered by the Alabama Initial Teacher Certification Testing Program. In general, the class claimed that: (1) the tests were implemented without adequate notice to the students and colleges; (2) the tests are unfair because they test students on matters which the students were not taught in the classroom; (3) the tests have an adverse and disproportionate impact on black colleges and black students; (4) the tests are culturally biased and bear no relationship to job performance as a teacher; (5) the tests' disparate impact on blacks cannot be justified because said tests were not properly validated; and (6) the actions of the defendants violate statutory and constitutional rights of the class representatives and plaintiff-intervenor.[163]

The defendants denied the allegations and affirmatively asserted that the process by which the tests were prepared did insure the tests to be valid. The defendants also asserted that they were using the tests as a device to insure that teachers in the classrooms of Alabama will have the knowledge necessary to teach.[164]

The court ordered that the defendants were permanently enjoined from using any teacher certification examination which has a disparate impact on black teacher candidates for initial, advanced level, or provisional certification, unless the examination has been validated for the purpose of teacher certification.

The court did allow that the defendants may require, as a precondition for certification to teach in the state of Alabama, a candidate's successful completion of a written subject-matter examination. However, the court applied lengthy, complex conditions concerning the examination. For example, the court ordered the items proposed to be used in any operational examination must be field tested using a large scale field test. Based on item statistics derived from the field test, the court ordered the items must be categorized and used in the new examination as follows:

> Type I. Items for which the item difficulty (i.e. p-value) for blacks and whites differs no more than 5%. Type II. Items for which the item difficulty (i.e. p-value) level for

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[161] *Id.* at 1101.

[162] 2000 U.S. Dist. LEXIS 123 (2000).

[163] *Id.*

[164] *Id.*

> blacks and whites differs by a percentage which is greater than 5% but not more than 10%. In devising a test under the provisions of paragraph two of this consent decree, Type I items shall be used exclusively as scoreable items, so long as they are available in sufficient numbers to provide comprehensive coverage of the objectives sought to be measured in the examination. Type II items shall be used as scoreable items, only if Type I items are not available in sufficient numbers to provide comprehensive coverage of the objectives sought to be measured in the examination. In no event shall the defendants use scoreable items which are not classified as Type I or Type II, except as provided for in subparagraph (d) below or as provided for in paragraph three of this Amended Consent Decree.[165]

A recent case alleging a disparate impact claim under Title VII is *Gulino v. Board Education*.[166] In *Gulino*, the plaintiffs filed a racial employment discrimination action against the New York State Education Department and the board of education of the City School District of the City of New York pursuant to Title VII, the New York State Human Rights Law and the New York City Human Rights Law on November 8, 1996. The plaintiffs allege that the two tests used by the board and state education department to determine qualification for teacher licenses had a disparate impact on African American and Latino teachers in the New York City public schools.

The plaintiffs are teachers in the New York City public school system who had either lost their teaching licenses or had been prevented from obtaining a teaching license because of the requirement that they achieve a satisfactory score on one of the two challenged tests: the National Teacher Core Battery (NTE) or the Liberal Arts and Sciences Test of the New York State Teacher Certification Examination (LAST), the successor to the NTE. The plaintiffs allege that the use of the tests as a requirement for obtaining permanent teaching certificates had an impermissible disparate impact on African American and Latino teachers in New York City public schools.[167]

The plaintiffs allege that white test-takers passed the NTE at an average rate of 83.7 percent while African American and Latino test-takers passed at rates of 40.3-43.9 percent. The plaintiffs also

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[165] *Id.*

[166] 2003 U.S. Dist. LEXIS 6822 (2003).

[167] *Id.*

allege that white test-takers passed the LAST at an average rate of 93 percent while African American and Latino test-takers passed at rates of 50-56.4 percent. As for New York City public school teachers, 78 percent of white teachers who took the NTE passed compared to 42 percent of African Americans and 34.9 percent of Latinos. With respect to the LAST, 79.1 percent of white teachers who took the exam passed, compared to 37.5 percent of African Americans and 28.3 percent of Latinos.

In *Gulino*, the most recently decided issue before the court was whether several hundred documents that have been received into evidence would compromise proprietary information and trade secrets belonging to National Evaluation Systems (NES), the company that developed the LAST—one of the two tests at issue in the case. The plaintiffs objected to having these documents sealed, arguing that they have already been received into evidence, that there has been significant testimony about them and that the public has a right to have access to these documents since their contents are of public concern. The court decided not to seal documents produced by NES and offered for admission into evidence by stipulation between the parties with the exception of documents containing actual test questions.[168]

One can readily see from the above cases that minority teachers may have legitimate Title VII claims against the teacher-testing programs based on a disparate impact theory. Their first hurdle in such a case, of course, would be to show that the test truly does impact disproportionately on nonwhites. While there is no precise definition of what constitutes "disparate impact," the Supreme Court in *Griggs v. Duke Power Co.* suggested that a test that disqualifies minority applicants "at a substantially higher rate than white applicants" is susceptible to a Title VII challenge.[169] The Equal Employment Opportunity Commission has adopted a benchmark call the four-fifths rule: "A selection rate for any race, sex, or ethnic group which is less than four-fifths ... (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact."[170] In other words, if the pass rate on a competency test for a minority group is less than 80 percent of the pass rate for whites, the test will be suspect. Though the four-fifths rule is just a guide, the United States Supreme Court and other courts in the Title VII cases have acknowledged it.[171]

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[168] Gulino v. Bd. of Educ., 2003 U.S. Dist. (S.D.N.Y., Apr. 8, 2003).

[169] 401 U.S. 424, 426 (1971).

[170] 29 C.F.R. §1607.4(D) (1989).

[171] *See e.g.*, Connecticut v. Teal, 457 U.S. 440, 443 n.4 (1982); Guardians Ass'n v.

Job Relatedness

If the statistics in past teacher-testing cases are any indication, many competency tests may be vulnerable under a four-fifths rule or some similar standard. Proof of a disparate impact, however, does not establish a Title VII violation. It simply shifts the burden to the employer to justify its use of the challenged employment practice (here, the competency test) by showing that it is related to job performance. This is the issue that will be most critical in a Title VII challenge to a teacher-testing program. Unfortunately, the law in this area currently is in a state of flux.

The disparate impact theory has its roots in *Griggs v. Duke Power Co.*, a case in which the Supreme Court declared that Title VII "proscribes not only over discrimination but also practices that are fair in form, but discriminatory in operation."[172] In addressing the employer's defense in a Title VII action, the Court stated: "The touchstone is business necessity. If an employment practice which operates to exclude [minorities] cannot be shown to be related to job performance, the practice is prohibited."[173] The Court also addressed testing procedures in particular, suggesting that they could not be used "unless they are demonstrably a reasonable measure of job performance."[174]

In other employment discrimination cases in the 1970s, the Supreme Court elaborated on its *Griggs* analysis. With respect to the employer's burden, the Court stated in *Albemarle Paper Co. v. Moody* that if the plaintiff established a prima facie case of discrimination—that is, showed a "disparate impact"—the employer then had "the burden of proving that its tests are job related."[175] The same standard was employed in *Dothard v. Rawlinson* two years later: "Once it is ... shown that the employment standards are discriminatory in effect," the employer bears that burden of "prov[ing] that the challenged requirements are job-related."[176]

After these cases, the courts settled into what seemingly was a well-established disparate impact analysis: the plaintiff had the burden of proving that the challenged employment practice had a disparate impact on minorities. Once that prima facie case was established (generally through the use of statistics), the employer had the burden of proving the practice was related to job perfor-

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Civil Serv. Comm'n, 630 F.2d 779, 87 (2d Cir. 1980) *cert. denied*, 452 U.S. 940 (1981).

[172] 401. U.S. at 431 (1971).

[173] *Id.*

[174] *Id.* at 436.

[175] 422 U.S. 405, 425 (1975) (emphasis added).

[176] 433 U.S. 321, 329 (1977).

mance. In 1989, however, the Supreme Court revisited this issue and effected what is perceived by many to be a significant change in the law of employment discrimination. In *Wards Cove Packing Co. v. Antonio*, the Court stated, "the employer carries the burden of producing evidence of a business justification for [its] employment practice. The burden of persuasion, however, remains with the disparate-impact plaintiff."[177]

The lower court in *Wards Cove*, relying on the Supreme Court's earlier pronouncements in the area, believed that the burden of persuasion shifted to the employer once the plaintiff established a prima facie case of disparate impact. The Supreme Court conceded that "some of [its] earlier decisions can be read as suggesting" the correctness of that view. "But to the extent that those cases speak of an employer's 'burden of proof' with respect to a legitimate business justification defense ... they should have been understood to mean an employer's production—but not persuasion—burden."[178] This analysis invoked a strong dissent by four justices, who accused the majority of infidelity to "a longstanding rule of law" and castigated the majority for its "latest sojourn into judicial activism."[179]

It is unnecessary to probe the fine distinctions between burdens of "persuasion" (or "proof") and burdens of "production." Suffice it to say that *Wards Cove* appears to have reduced the employer's burden from what may courts and legal scholars believed it to be. Assuming the validity of this assumption, the decision has made it more difficult for plaintiffs to win discrimination suits. That conclusion seems to be supported by some of the Court's language. For example, the Court made it clear that "there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster." Moreover, "the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer."[180]

In the teacher-testing context, proving job relatedness is tantamount to proving test validity. In *Albemarle Paper Co. v. Moody*,[181] for example, the Supreme Court considered the use of a preemployment testing program that had a disparate impact on black applicants. After noting that the employer had the burden of proving job relatedness, the Court focused on the employer's efforts to "validate" the job relatedness of its testing program. The

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[177] 109 S. Ct. 2115, 2126 (1989).

[178] *Id.* (citation to *Dothard* omitted).

[179] *See id.* at 2127-28 (Stevens, J., dissenting) (joined by Brennan, Marshall, and Blackmun).

[180] *Id.* at 2125-26.

[181] 422 U.S. 405 (1975).

court offered a lengthy comparison of the defendant's validation study with the EEOC's Uniform Guidelines and concluded that the employer had not met its burden of proving job relatedness.[182]

Other courts considering Title VII challenges to teacher-testing programs have also explicitly equated job relatedness with test validity.[183] Even in the Title VII context, then, the importance of the test validation issue cannot be overstated. Once again, the extent to which school officials will be able to use testing to evaluate teachers may depend on whether courts require serious validation efforts.

A recent teacher-test case decided by a federal court accepted what it termed a "content" validation justification for the California teacher test, the CBEST. There the validation evidence included: practitioner reviews of skill definitions and items, rank-ordering by practitioners of the importance of relevant job skills, literature reviews identifying teacher's job activities, observations of teachers on the job, and interviews with the teacher. The test was also supported with validity evidence that included a curriculum-matching project that matched the specifications of the teacher tests to material found in the textbooks used in the state's K-12 schools. In addition, the court cited the professional recognition of the quality of the practices of the testing company that designed the tests, the Education Testing Service.[184]

Availability of Alternative Measures

One final aspect of traditional Title VII jurisprudence should be considered. Courts customarily have adhered to a three-part analysis in considering disparate impact claims. First, the plaintiff must show the impact on minorities. The burden then shifts to the employer to show the tests are job related—that is, have been validated. "If an employer does then meet the burden of proving that its tests are job related, it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in efficient and trustworthy workmanship."[185] Such

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[182] *See id.* at 425-36.

[183] *See e.g.* York v. Ala. State Bd. of Educ., 581 F. Supp. 79, 785 (M.D. Ala. 1983); United States v. South Carolina, 445 F. Supp. 1094, 1112 (D.S.C. 1977), *aff'd mem.* 434 U.S. 1026 (1978).

[184] Association of Mex.-Am. Educators v. California, 195 F.2d 465 (9th Cir. 1991), *aff'd.* 231 F.3d 572 (9th Cir. 2000).

[185] *Albermarle Paper Co.*, 422 U.S. at 425 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973)). *See also* Dothard v. Rawlinson, 433 U.S. 321, 329 (1977).

a showing by the plaintiff would establish a Title VII violation, on the theory that the existence of nondiscriminatory but equally viable selection methods is evidence that the employer selected its tests as a "pretext" for racial discrimination.[186]

Wards Cove apparently has not changed this part of the Title VII analysis. The Supreme Court in that case stated that:

> Once a plaintiff establishes a prima facie case of disparate impact resulting from challenged employment practices; the case will shift to any business justification [defendants] offer for their use of these practices. This phase of the disparate-impact case contains two components: first, a consideration of the justifications an employer offers for [its] use of these practices; and second, the availability of alternative practices to achieve the same business ends, with less racial impact.[187]

The Court made it clear that the burden of persuasion with respect to alternatives falls on the plaintiff, and by its language the Court suggested that this would be a difficult burden to overcome. First, "any alternative practices [plaintiffs] offer up in this respect must be equally effective as [the employer's] chosen hiring procedures in achieving [the employer's] legitimate employment goals."[188] Moreover, factors such as "the cost or other burdens" of proposed alternatives are to be considered in determining whether such alternatives will be "equally as effective." The Court capped its discussion by noting that employers generally are better equipped than courts to decide what employment practices will be appropriate and warning that "the judiciary should proceed with care before mandating that an employer must adopt a plaintiff's alternate selection or hiring practice in response to a title VII suit."[189]

It is possible, then, that a Title VII plaintiff could prevail, even if school officials have properly validated their competency test, by proffering some alternative method of measuring teacher competency which would have less of a racial impact. That result is unlikely, however, given the requirements that any alternative be "equally effective," the Supreme Court's clear deference to the decisions of employers, and the dearth of reliable measures of teacher competency. The real battle in a Title VII suit would still appear to revolve around the job relatedness/test validation issue.

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[186] *Albermarle Paper Co.*, 422 U.S. at 425.

[187] 109 U.S. 2125.

[188] *Id.* at 2127 (emphasis added).

[189] *Id.*

Discrimination Against Persons with Disabilities

In administering teacher competency tests, school officials must also be careful not to discriminate against teachers with disabilities that may affect their test performance. Statutory claims have been made against school districts based on Section 504 of the Rehabilitation Act of 1973, which provides that "[n]o otherwise qualified individual with handicaps ... shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance."[190]

Because most public schools do receive federal financial assistance, they are susceptible to challenges brought under this Act. The most difficult issues in such a case generally are whether the plaintiff is "otherwise qualified" for the employment benefit sought (a particular position, promotion salary increase, etc.), and whether the plaintiff was excluded solely on the basis of a handicap. In *Upshur v. Love*,[191] for example, a blind teacher brought suit under section 504 against his school district, alleging the district unlawfully discriminated in denying the teacher an administrative position. Applicants for such positions were evaluated in part on the basis of a written examination, and the plaintiff, who had the assistance of a reader during administration of the exam, finished in the bottom 25 percent of the applicants who took the exam. Despite the plaintiff's contention that he was denied an administrative position solely because he was blind, the court denied and concluded that his blindness was not the determinative factor in the district's decision; the plaintiff was not "otherwise qualified" for an administrative position, nor was he excluded from consideration solely because of his handicap.

In considering the "otherwise qualified" issue, school officials must realize that courts often construe section 504 to require employers to make some accommodations for persons with disabilities. "[W]hile [an employer] need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable' ones."[192] In the teacher-testing context, such "reasonable accommodations" may have to include special testing procedures, such as additional time to take the exam, the use of readers to read the test questions to

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[190] 29 U.S.C. §794(a) (1988).

[191] 474 F. Supp. 332 (N.D. Cal. 1979).

[192] Alexander v. Choate, 469 U.S. 287, 300 (1985). *See also* School Bd. v. Arline, 480 U.S. 273, 289 n.19 (1987) ("Employers have an affirmative obligation to make reasonable accommodation for a handicapped employee.").

the test-taker, the use of computers, or perhaps even changes in the test format.

A dyslexic teacher who failed at the TECAT made a section 504 challenge to the competency testing program in Texas.[193] While the court in that case held for the school district, other courts, and the United States Congress, have become more vigilant in protecting the rights of disabled persons. For example, in *Wynne v. Tufts University School of Medicine*,[194] the First Circuit considered a section 504 suit brought by a former medical student who was dismissed from medical school after he failed several first-year courses. The student learned after he completed his first year of school that he had dyslexia, which impaired his ability to answer multiple-choice questions. He claimed that the medical school's failure to offer an alternative to written multiple-choice examinations constituted discrimination in violation of section 504. The district court entered judgment for the school, finding the plaintiff not "otherwise qualified" for the medial program. The First Circuit, however, reversed, focusing on the "reasonable accommodations" requirement of section 504:

> the ultimate question does not concern Wynne's ability to meet the requirements of Tufts Medical School as they now exist. The issue instead is whether there is a reasonable accommodation to Wynne's disability that can be made by Tufts so as given him "meaningful access" to the medical education offered there.[196]

While the court said it subscribed to "the principle of deference to academic decision-making," it felt that Tufts "failed to prove ... that retention of written multiple choice examinations is sufficiently basic to its medical school program that it may insist upon them to the detriment of dyslexic students like Wynne."[196] The court suggested that essay exams might meet the school's objectives just as well as multiple-choice exams, and remanded the case for consideration of potential accommodations that could be made for students such as Wynne.

The *Wynne* case should raise the consciousness of educational policymakers considering the use of testing programs in the evaluation of teachers. An even more important development, however, is the enactment of the Americans with Disabilities Act of 1990.[197]

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[193] Chapline v. Cent. Educ. Agency, No. A-86-CA-521 (W.D. Tex. Nov. 18, 1988).
[194] 976 F.2d 791; 1992 U.S. App. LEXIS 24933 (1992), *cert. denied* (1993).
[195] *Id.* at 793.
[196] *Id.* at 794.
[197] 42 U.S.C. 121010 *et seq.*

The Americans with Disabilities Act applies to employers with fifteen or more employees, so virtually all public school districts are covered by its provisions. The Act provides that no such employer "shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment." Just as intent to discriminate need not be proven to establish a violation of Section 504 of the Rehabilitation Act of 1973,[198] the Act likewise reaches employment practices that have the effect of discrimination on the basis of disability.

The Act specifically addresses the issue of testing, making it clear that the failure to make reasonable accommodations in the testing process may violate the law:

> the term "discriminate" includes ... failing to select and administer tests concerning employment in the most effective manner to ensure that when such a test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skill, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).[199]

As a practical matter, the Americans with Disabilities Act does not impose any requirements on school officials that section 504 of the Rehabilitation Act does not already impose. The Act does, however, underscore a deep national concern over discrimination against persons with disabilities. Therefore, it puts school officials on clear notice that teacher evaluation practices that screen out disabled persons will be seriously scrutinized in the courts.

Age Discrimination

The Age Discrimination in Employment Act of 1967 (ADEA)[200] protects individuals over the age of forty from discrimination on

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[198] *See* Alexander v. Choate, 469 U.S. 287, 292-99 (1985).

[199] *Id.*

[200] 29 U.S.C. §§621-634 (1988).

the basis of age. While the Supreme Court has not specifically addressed the issue, the lower federal courts have uniformly assumed that a "disparate impact" analysis, similar to that used in Title VII cases, is equally applicable to ADEA claims.[201] In other words, a plaintiff bringing an age discrimination suit need not prove the employer purposefully or intentionally discriminated against the plaintiff because of his or her age; it is enough to establish a prima facie case of age discrimination if the plaintiff can show that the employer's facially neutral actions had a significant disproportionate impact on employees over forty years of age.

There is at least one reported case in which an age discrimination claim was made against a teacher competency test, again involving the Texas testing program. In *Fields v. Hallsville Independent School District*,[202] two experienced teachers, one a sixty-one-year-old black woman and the other a fifty-nine-year-old black woman, failed the TECAT and were terminated from their teaching positions. In their suit against the school district, they claimed racial discrimination in violation of Title VII and age discrimination in violation of the ADEA. The court rejected both claims.

Miscellaneous Legal Considerations

A teacher-testing program may indirectly implicate a myriad of legal issues. While it would be speculative to try to catalog all of the potential concerns, the following cases provide an illustration of the kind of legal issues school officials must face.

In *Troup County Board of Education v. Daniel*,[203] the Georgia Court of Appeals held that a teacher could receive unemployment compensation following her resignation after she failed the Georgia competency test three times. The teacher was entitled to the benefits even though she was free to take the exam several more times in an effort to pass.

An interesting case involving the Arkansas testing program was decided in 1990. In *Mosley v. McGehee School District*,[204] a sixty-year-old junior high school principal died of a heart attack the morning after taking the Arkansas Teacher Competency Test. His widow filed a workers' compensation claim, alleging that the stress and anxiety of taking the test caused her husband's death.

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[201] *See* M. Player, E. Shoben & R. Lieverwitz, Employment Discrimination Law 587 (1990) and cases cited therein.

[202] 906 F.2d 1017 (5th Cir. 1990).

[203] 381 S.E.2d 586 (Ga. Ct. App. 1989).

[204] 783 S.W.2d 871 (Ark. Ct. App. 1990).

The workers' compensation commission held that the principal's death was not job related and denied the benefits. On judicial review of that decision, however, the court reversed and remanded the case back to the commission for further fact-findings regarding the cause of death.

Social and religious conservatives relying upon the privacy and religious freedom provisions of federal and state constitutions have initiated some recent legal challenges to public education practices in recent years. In this context, claims could be made that the definitions of teaching competence and the standards for assessing educators intrude upon the rights of individuals to privacy and to freedom of speech and religious practice.[205]

It is recommended for states to review the definitions and measures of teaching competency to assess whether any elements might present an opportunity for these types of claims and, if so, to decide whether it is important to retain these elements. In addition, mandatory test administration sessions scheduled at times conflicting with religious holidays should be avoided.[206]

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[205] *See* Hennessey v. City of Melrose, 194 F.3d 237 (1st Cir. 1999) (student teacher challenging failing grade in student teaching practicum asserting free speech right to depart from curriculm at school district placement).

[206] 30 J.L. & Educ. 383 (2001).

Teacher Evaluation and Defamation

One of the unpleasant tasks school administrators face in the evaluation process is to report on the deficiencies of the teachers they are evaluating. Because this part of the process necessarily entails saying critical things about another person, administrators must be alert to the possibility of defamation claims being brought against them by teachers whose employment status may be affected by an adverse evaluation.

A significant number of cases have been decided in the last several years involving such defamation claims, both in higher education and at the elementary or secondary level. Though few teacher-plaintiffs have succeeded on a defamation theory, administrators should be aware of the legal standards by which libel and slander claims are judged.

Defamation, which includes both libel and slander, is a false publication causing injury to a person's reputation, exposing the person to public hatred, contempt, ridicule, shame or disgrace, or affecting the person adversely in his or her trade or business.[1] *Slander* refers to spoken defamatory words, while libel refers to written or printed defamatory words.[2] To establish defamation, a plaintiff must show: (1) the defendant made a false statement, (2) the statement was defamatory, (3) the statement was published, (4) the plaintiff was injured as a result of the statement, and (5) the defendant acted with the required degree of fault.[3]

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[1] Sweitzer v. Outlet Communications, Inc. (1999), 133 Ohio App. 3d 102, 108, 726 N.E.2d 1084, *citing* Matalka v. Lagemann (1985), 21 Ohio App. 3d 134, 136, 21 Ohio B. 143, 486 N.E.2d 1220.

[2] Mallory v. Ohio Univ., Franklin App. No. 01 AP-278, 2001 Ohio 8762, *citing* Lawson v. AK Steel Corp. (1997), 121 Ohio App. 3d 251, 256, 699 N.E.2d 951.

[3] *Sweitzer (supra).*

Actionable defamation falls into two categories, defamation *per quod* or *per se*.[4] In defamation *per quod*, a publication is merely capable of being interpreted as defamatory, and the plaintiff must allege and prove damages.[5] In *Ausler v. Arkansas Department of Education*,[6] the plaintiff claimed her supervisor's communication, a response to the plaintiff's grievance, was defamatory. Under Arkansas law, the following elements must be proven to support a claim of defamation, whether it be the spoken word (slander) or the written word (libel): (1) the defamatory nature of the statement of fact; (2) that statement's identification of or reference to the plaintiff; (3) publication of the statement by the defendant; (4) the defendant's fault in the publication; (5) the statement's falsity; and (6) damages.[7]

In finding the plaintiff and the Arkansas Department of Education (ADE) did not dispute that the communication the supervisor sent to the state grievance review committee and supervisors, in response to a grievance filed by the plaintiff, was the basis for the plaintiff's defamation claim, the court was not persuaded the plaintiff had established the publication element required under Arkansas law. The court found the dissemination of the supervisor's communication was between officials within the ADE agency and not a publication to third persons.[8]

To constitute defamation *per se*, the "words must be of such a nature that courts can presume as a matter of law that they tend to degrade or disgrace the person of whom they are written or spoken, or hold him up to public hatred, contempt or scorn."[9] A statement will be considered defamation per se if the statement tends to injure a person in his or her trade, profession, or occupation.[10] When a statement is found to be defamation per se, both damages and actual malice are presumed to exist.[11] Thus, disparaging statements about a teacher's abilities or past performance may be defamatory, even if made during the evaluation process.[12] Certainly allegations

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4 McCartney v. Oblates of St. Francis deSales (1992), 80 Ohio App. 3d 345, 353, 609 N.E.2d 216.

5 Dodley v. Budget Car Sales, Inc., 1999 Ohio App. LEXIS 1790 (1999).

6 245 F. Supp. 2d 1024; 2003 U.S. Dist. LEXIS 3048 (2003).

7 *See* Brown v. Tucker, 330 Ark. 435, 954 S.W. 2d 262 (1997).

8 *See* Gumbhir v. Curators of Univ. of Mo., 157 F.3d 1141 (8th Cir. 1998) (stating that communication between officers of the same corporate entity in the due and regular course of corporate business is not a publication to a third person).

9 Moore v. P.W. Publ'g Co. (1965), 3 Ohio St. 2d 183, 188, 209 N.E.2d 412, *cert. denied* (1966), 382 U.S. 978, 86 S. Ct. 549, 15 L. Ed. 2d 469.

10 Becker v. Toulmin (1956), 165 Ohio St. 549, 553-554, 138 N.E.2d 391.

11 *Dodley, supra*, citing Westropp v. E.W. Scripps Co. (1947), 148 Ohio St. 365, 74 N.E.2d 340.

12 *See, e.g.*, Stonkus v. City of Brockton Sch. Dep't, 322 F.3d 97 (1st Cir. 2003).

of incompetence can serve as a basis for a defamation action.[13] There are, however, several lines of defense available to an administrator in guarding against such claims.

Truth as a Defense

Both libel and slander are defined in terms of false statements that are injurious to the reputation of another.[14] Therefore, truth is always the first potential defense in a defamation suit.

In *Smith v. Des Moines Public Schools*,[15] Smith was attempting to retrieve secret files he suspected a secretary was keeping on him. The secretary tried to block his way and the two had physical contact. Smith contended that he accidentally bumped into the secretary as she tried to prevent him from reaching the files. The secretary accused Smith of hitting her. Smith was placed on administrative leave pending the outcome of the investigation. The secretary filed a complaint with the Des Moines Police Department alleging that Smith assaulted her. Two district employees witnessed the incident and related that Smith raised his left arm and pushed the secretary away, and that Smith "used his body like to deflect or shove away" as he was standing up.[16]

Smith was charged with assault and arrested. The secretary signed a confidential settlement agreement and mutual release, releasing Smith from any further liability in connection with the incident. The prosecutor filed a notice of intent not to prosecute on the basis that the victim did not want to pursue prosecution.[17]

Subsequently, Smith attempted to revoke the settlement agreement. In a meeting between counsel from both Smith and the district, the district's counsel produced a photograph allegedly taken of the secretary's bruised arm, which prompted Smith to reconsider revoking the settlement agreement because he feared that the district might bring future criminal charges against him.[18]

In Smith's lawsuit alleging the district's characterization of his unsafe workplace behavior was defamatory, the district argued that the allegedly defamatory remarks were substantially true because they captured the "sting or gist of the defamatory charge," which

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[13] *Id.*

[14] BLACK'S LAW DICTIONARY 417 (6th ed. 1990). *See also* Rosenthal v. Regents of Univ. of Cal., 269 Cal. Rptr. 788, 791 (Ct. App. 1990); Manguso v. Oceanside Unified Sch. Dist., 153 Cal. App. 3d 574, 200 Cal. Rptr. 535, 538 n.4 (1984).

[15] 259 F.3d 942, (8th Cir. 2001).

[16] *Id.* at 943.

[17] *Id.*

[18] *Id.*

the district characterized as Smith's unsafe workplace behavior in pushing the secretary out of his way to get the files. In ruling for the district, the court held it may determine as a matter of law whether a statement has the gist or sting of the defamatory charge when the underlying facts are undisputed.[19]

In *Lindemuth v. Jefferson County School District R-1*,[20] an assistant basketball coach brought a defamation action when he lost his job after a superior told various persons about the plaintiff's past history of child molestation (fourteen years earlier, the plaintiff had pleaded "no contest" to a charge of attempted assault on a child). The court rejected the plaintiff's claim, noting that the alleged defamatory statements were substantially true and "[s]ubstantial truth is an absolute defense to a defamation claim."[21] In a similar case, a physical education teacher who was terminated following accusations of child molestation lost his defamation suit in part because he could not refute the defendants' evidence that the disclosures were true.[22]

Another case, *Berlin v. Superintendent of Public Instruction*,[23] also highlights the importance of the truth or falsity issue. The plaintiff in that case was a supervisor in a special education program who was criticized for comments he made at a public hearing. He responded to the criticism with a defamation suit against various school officials. In rejecting the plaintiff's claim, the court noted that it was unlikely the comments he was objecting to would be deemed false.[24]

It is incumbent on school administrators, then, to check their facts carefully before making public disclosures that may impugn the reputations of teachers they are evaluating. If such disclosures are found to be substantially true, an administrator will be absolutely protected in a defamation action.

Privilege/Immunity

Even if statements made during the evaluation process are false, school administrators still will be entitled to some degree of protection in the form of a "privilege" or "immunity." The California Civil Code, for example, defines libel and slander as "false and unprivi-

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[19] *Id.* at 945.

[20] 765 P.2d 1057 (Colo. Ct. App. 1988).

[21] *Id.* at 1058.

[22] Bowman v. Parma Bd. of Educ., 44 Ohio App. 3d 169, 542 N.E.2d 663, 668 (1988).

[23] 181 Mich. App. 154, 448 N.W.2d 764 (1989).

[24] 448 N.W.2d at 768.

leged" communications.[25] The privilege issue often is determinative in a teacher defamation suit. When does a privilege or immunity apply? Generally, that will depend on the applicable defamation statutes or case law in the state where the suit is brought. Thus, it is important for school officials to have some understanding of the local law. Some states recognize a broad range of "privileged occasions,"[26] while other states provide more limited protection.

In *Cornellison v. Julian Union High School District*,[27] Cornellison alleged (*inter alia*) a board member made a slanderous statement about him at a board meeting and that he was constructively terminated. The trial court entered summary judgment, concluding the board member's remark was absolutely privileged under California's Civil Code Section 47, subdivision (b), and that the privilege was not abused.

The court of appeals held where the facts are undisputed, the availability of the absolute privilege can be decided as matter of law.[28] Any doubt as to whether the privilege applies must be resolved in favor of the privilege.[29] The court ruled section 47, subdivision (b) established an absolute privilege for a publication made in any legislative or judicial proceeding or "any other official proceeding authorized by law." The purpose of the privilege is to eliminate the threat of liability for communications made during these types of truth-seeking proceedings. (*See Silberg v. Anderson*).[30]

In *Silberg*, the California Supreme Court formulated a four-part test for determining whether the absolute privilege (commonly known as the "litigation" privilege) applies.[31] In the context of a judicial proceeding, the *Silberg* court articulated the test as follows: "The privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action."[32] The *Silberg* court explained that the latter two parts of the test really describe one requirement—that the challenged communication is logically related to the proceeding.[33]

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[25] Cal. Civ. Code §§45-46 (West 1982) (emphasis added).

[26] Nodar v. Galbreath, 462 So. 2d 803, 809 (Fla. 1984).

[27] 2003 Cal. App. unpub. LEXIS 2414 (2003).

[28] Susan A. v. County of Sonoma, 2 Cal. App. 4th 88, 3 Cal. Rptr. 2d 27 (1991).

[29] Home Ins. Co. v. Zurich Ins. Co., 96 Cal. App. 4th 17, 116 Cal. Rptr. 2d 583 (2002).

[30] 50 Cal. 3d 205, 213, 266 Cal. Rptr. 638, 786 P.2d 365 (1990).

[31] *Id.* at 209, 212.

[32] *Id.* at 212.

[33] *Id.* at 219-220. *See* Kashian v. Harriman, 98 Cal. App. 4th 892, 919 (2002).

One recurrent theme in the defamation law of the various states is that an immunity or privilege applies only when the challenged statements are made in the course of one's employment. For example, in *Agins v. Darmstadter*,[34] a 1989 New York case in which a teacher brought a defamation suit against a superintendent for comments made to district personnel during an investigation into alleged misconduct by the teacher, the court held there could be no liability because the comments were made in the course of the superintendent's official duties. In *Berlin v. Superintendent of Public Instruction*,[35] the court suggested a more restrictive approach under Michigan law: local school officials were entitled to immunity when acting in the course of their employment, but only when performing "discretionary," rather than ministerial, acts.[36]

In a related vein, state law often will restrict the privilege to communications between "interested" persons. In *Manguso v. Oceanside Unified School District*,[37] a superintendent prepared a letter evaluating a former teacher's performance. The letter was forwarded to the teacher's college placement file, where it was available to prospective employers. When the teacher discovered that the letter included unfavorable remarks, she brought a defamation action against the superintendent and the school district. The court held that the letter was not libelous because it "was written by an educator, regarding qualifications of a particular teacher and directed to those prospective employers of that teacher." As such, it was subject to a privilege under California law for communications "to a person interested therein ... by one who is also interested."[38]

The "interested persons" notion appears to provide for an expansive application of privilege or immunity, one that may extend beyond administrators' statements during the course of a formal evaluation process. For instance, a 1989 Michigan case involved a statement by a university student to a department chair that a faculty member assigned to the department had sexually assaulted her. The faculty member's later defamation claim against the student was rejected by the court on the basis of a state law privilege for communications on matters of "shared interest" between two parties.[39] Similarly, in *Nodar v. Galbreath*,[40] a high school teacher

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[34] 153 A.D.2d 600, 544 N.Y.S.2d 635, 636 (1989).

[35] 448 N.W.2d 764.

[36] *Id.* at 766.

[37] 153 Cal. App. 3d 574, 200 Cal. Rptr. 535 (1984).

[38] 200 Cal. Rptr. at 538 & n.3. *See also* Rosenthal v. Regents of Univ. of Cal., 269 Cal. Rptr. 788, 791 (Ct. App. 1990) (California protects communications as privileged if made between "interested" persons).

[39] Rosenboom v. Vanek, 182 Mich. App. 112, 451 N.W.2d 520, 522 (1989) *appeal denied* (1990).

[40] 462 So. 2d 803 (Fla. 1984).

brought a slander action against the parent of a student for comments the parent made at a school board meeting regarding the teacher's performance. The Florida Supreme Court held that the parent's comments were privileged under Florida law based on both (1) a "mutuality of interest of speaker and listener," and (2) the fact that the comments were those of "a citizen to a political authority regarding matters of public concern."[41]

Neither of the above cases involves potential administrator liability, of course, because other interested persons made the alleged defamatory statements to the administrators. Nonetheless, they are important in the overall evaluation context because school officials often must rely on information gathered from others in making their evaluations of teachers. Administrators can take heart, then, in the fact that the scope of immunity generally is expansive and should encourage interested third persons to make full disclosures during the evaluation process.

Abuse of the Privilege/Malice

Though the scope of the privilege for defamation defendants may be broad, it is not unlimited. School officials must realize that in every state the privilege is conditional or qualified—that is, one is protected only if there is no abuse of the privilege. For example, in *Holland v. Kennedy*,[42] a college professor who was terminated brought a defamation action against the president of the college for statements made to the board of trustees regarding the "incompetence" of the professor. While the court recognized a qualified privilege for communications between persons "directly interested" in some matter, it also made clear that the privilege may be lost if the statements are made "outside the circle" of those persons with a legitimate and direct interest in the subject matter of the communications.[43]

The Tenth Circuit Court of Appeals addressed the issue of qualified governmental immunity concerning board members' speech. In *McClure v. Independent School District No. 16, Mayes County Oklahoma*,[44] a teacher was dismissed for allegations including smoking and drinking alcohol on school property. The school board's attorney submitted affidavits from thirteen school district employees, making various accusations against the teacher.

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[41] *Id.* at 809-10.

[42] 548 So. 2d 982 (Miss. 1989).

[43] *Id.* at 987.

[44] 228 F.3d 1205 (2000).

The teacher's attorney moved to have the affidavits barred on the ground that their admission denied the teacher the right to cross-examination. The board's attorney responded that the affiants had refused to appear in person and, because the school board had no subpoena power, the board's attorney could not force the affiants to provide live testimony.

In addition, the teacher objected to participation of two board members in the due process hearing, because those two board members had previously stated the teacher should be terminated. Those two board members declined to disqualify themselves and the hearing proceeded. The board voted unanimously to immediately terminate the teacher.

The Tenth Circuit Federal Court of Appeals affirmed in part and reversed in part, holding (in part): (1) since the hearing was the only one provided to the teacher, it was governed by the constitutional requirements applicable to post-termination hearings; (2) the trial court erred in limiting the employee's compensatory damages to a single school year on the ground the teacher failed to mitigate her damage, because the evidence demonstrated the teacher tried to find other work, without success; and (3) the trial court erred in granting summary judgment to two board members based on qualified immunity, because statements attributed to those two board members raised a genuine issue of material fact as to whether they were biased when they sat on the board which voted to terminate the teacher's employment with the district.[45]

The most common type of privilege abuse, however, and often the key issue in many defamation cases, is malice on the part of the communicator. The states uniformly recognize that one is not protected from a defamation claim, even if a privilege appears applicable, if that person's statements were made with malice.

The definition of malice varies among different jurisdictions, but generally speaking, malice goes to the good faith of the person making the statements. In *Berlin*, the Michigan court specifically stated that local school officials were entitled to a qualified immunity only when acting "in good faith."[46] Similarly, the Mississippi court in *Holland* defined malice in terms of "bad faith."[47] A case from Maine also provides a good example. In that case, a college teacher who was denied tenure sued a colleague for comments made to a tenure committee. The court noted that the defendant was entitled to a conditional privilege as long as there was no abuse of

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[45] *Id.* at 1207.

[46] 448 N.W.2d at 766.

[47] 548 So. 2d at 987.

exposed themselves to a greater risk of injury from defamatory statements.[55]

The upshot of these cases is that a public official (or public figure) plaintiff bears a heavier burden of proof in a defamation case. The defendant's privilege in such a case is not absolute—it is still a qualified privilege—but the plaintiff faces a higher standard on the issue of malice. The *New York Times* decision prevents a public official from recovering damages unless it is shown that the defendant made the defamatory statement with "'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[56] The courts have made clear that this is a subjective test, going to the actual state of mind of the communicator rather than measuring the defendant's conduct by what a reasonable person would have done.[57]

All states are bound by the federal constitutional standard of *New York Times*, but some states may also have an even more restrictive definition of actual malice in their statutes. In *Manguso*, for example, the court addressed a California statute on actual malice which requires a plaintiff to prove that the defendant acted both out of "hatred or ill will" and (as opposed to "or," for malice generally) "without a good faith belief in the truth" of the statements.[58] Though the court in *Manguso* held that the actual malice statute did not apply to a teacher's suit against a school administrator,[59] the lesson again is to pay attention to the applicable state law on defamation.

The actual malice standard of *New York Times* will not apply, of course, unless the plaintiff is considered a public official or public figure.[60] In the teacher evaluation context, a key issue is whether a public school teacher falls within one of those categories. Unfortunately, that issue is unresolved. Some state courts have held that teachers are public officials or public figures (and therefore bear

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[55] *See* Curtis Publ'g Co. v. Butt, 388 U.S. 130, 162-64 (1967) (Warren, C.J. concurring).

[56] 376 U.S. 254 (1964).

[57] *See, e.g.*, Luper v. Black Dispatch Publ'g Co., 675 P.2d 1028, 1033 (Okla. Ct. App. 1983), *cert. denied* (1984).

[58] 200 Cal. Rptr. at 539.

[59] The court held that the statute provided a shield only for newspaper articles and radio broadcasts. *See id.*

[60] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 344-47 (1974) (declining to extend *New York Times* standard to defamation actions brought by private individuals).

the privilege, such as speaking with a "malicious intent."[48] In *Peters v. Baldwin Union Free School District*,[49] the Court held, "there is a critical difference between not knowing whether something is true and being highly aware that it is probably false."[50] While the latter will support a defamation claim, the former will not.

These courts focused on the state of mind of the communicator, but the malice inquiry need not be so subjective. While a malicious intent to harm the reputation of the plaintiff probably would remove the privilege in every state, some states also recognize a more objective standard for determining whether a person has acted in good faith. The California law applied in *Manguso v. Oceanside Unified School District*, for example, permits a finding of malice if an administrator either (1) acts with "hatred or ill will" toward a teacher, or (2) "lack[s] reasonable grounds for believing the truth of the false statements."[51] Similarly, in *Bego v. Gordon*,[52] a 1987 case involving comments about a music teacher made by a superintendent in front of the teacher's class, the Supreme Court of South Dakota stated that, "In order to be privileged, a communication must be without malice." The court went on to define malice: "This qualified or conditional privilege may be lost when the speaker, on an otherwise privileged occasion, published false and defamatory matter concerning another which either (a) [the speaker] in fact does not believe to be true or (b) has no reasonable grounds for believing it to be true."[53]

The burden is on the plaintiff in a defamation case to show that the defendant acted with malice. The discussion above suggests that the weight of the plaintiff's burden depends in part on the state's definition of malice. It may also depend on the legal status of the plaintiff—that is, whether the plaintiff is considered a "public figure" rather than simply a private individual.

In *New York Times v. Sullivan*,[54] the United States Supreme Court recognized a First Amendment constitutional privilege for persons making statements relating to the "official conduct" of a "public official." The Court has since extended that privilege to cases involving "public figures" engaged in an activity of public concern, on the theory that persons in the public eye have voluntarily

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[48] Gautschi v. Maisel, 565 A.2d 1009, 1011 (Me. 1989).

[49] 320 F.3d 164 (2003).

[50] *See* Liberman v. Gelstein, 80 N.Y.2d 429, 438, 590 N.Y.S.2d 857, 605 N.E.2d 344 (1992).

[51] 200 Cal. Rptr. at 539.

[52] 407 N.W.2d 801 (S.D. 1987).

[53] *Id.* at 811 (citing Gardner v. Hollifield, 97 Idaho 607, 549 P.2d 266, 269 (1976)).

[54] 376 U.S. 254 (1964).

the heavier burden of proof of malice),[61] while others have held they are not.[62]

The distinction between these categories of "public" or "private" figure is shown in a comparison of two cases. In *Richmond Newspapers, Inc. v. Lipscomb*,[63] the court held that public school teachers were private citizens. In this case, the plaintiff-teacher's name was published in a paper stating that she was "disorganized, erratic, forgetful and unfair ... [left] the classroom for long periods ... and demeaned and humiliated [the bright] students."[64] The article then quoted a minister-parent as saying, "she is hurting these kids ... [and] she is bad for this system, bad for these kids."[65] The court noted that the reporter did not interview those students, colleagues, and administrators who believed that the plaintiff was a good teacher who had been falsely accused—information that contradicted all of the published material.[66]

Because the court held that teachers are not public officials in Virginia, the court applied the state negligence standard for private citizens to the plaintiff in this case. Under this standard, the newspaper and its employees had a duty to investigate whether the statements made were truthful and needed to be mindful that "a substantial danger of injury to [her] reputation [existed]."[67] The court found that "a reasonably prudent news reporter writing this article could readily have contacted a number of other students to verify (or contradict) these accusations and should have done so."[68] The plaintiff was able to get to a jury and was awarded $100,000 in compensatory damages, which the appeals court upheld.[69]

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[61] *E.g.*, Bowman v. Parma Bd. of Educ., 44 Ohio App. 3d 169, 542 N.E.2d 663, 669 (1988) (public school teacher is public official); Luper v. Black Dispatch Publ'g Co., 675 P.2d 1028, (Okla. Ct. App. 1983) *cert. denied* (1984); *see also* Stutzman v. Chi. Bd. of Educ., 171 Ill. App. 3d 670, 525 N.E.2d 903, 907 (*New York Times* applies in suit by principal), *appeal denied*, 535 N.E.2d 411 (1988); Walko v. Kean Coll., 235 N.J. Super. 139, 561 A.2d 680, 686-87 (1988) (college teacher or administrator can be public figure); Scott v. News-Herald, 25 Ohio St. 3d 243, 496 N.E.2d 699, 704 (1986) (superintendent is public official).

[62] *E.g.*, Nodar v. Galbreath, 462 So. 2d 803, 808 (Fla. 1984) (high school English teacher is not public official); *see also* Staheli v. Smith, 548 So. 2d 1299, 1304-05 (Miss. 1989) (state university professor is not public figure).

[63] 362 S.E.2d 32 (Va. 1987).

[64] *Id.* at 34.

[65] *Id.*

[66] *Id.* at 35, 38.

[67] *Id.* at 38.

[68] *Id.*

[69] *See id.* at 44-45. The jury originally awarded the plaintiff one million dollars in compensatory damages. However, the court reduced this amount to $100,000. She also received an additional $45,000 in punitive damages.

Campbell v. Robinson[70] illustrates an opposite holding to the court in *Richmond Newspapers, Inc.* In *Campbell*, a newspaper published an article charging that area schools were unsafe because felons were working within the school system. The article stated that Campbell, a teacher at an arts and sciences school, was a felon and should not be working with children, implying that he was a child molester. The article went on to state that twenty-four years earlier Campbell had been arrested for "'contributing to the delinquency of a minor' in a case in which police charged him with having sex with a thirteen-year-old girl."[71] The article further stated that he had been arrested three times since on other charges (apparently without charge or conviction) and had a warrant out for failing to appear in court regarding a charge of making an illegal U-turn. It also reported that fifteen years earlier, female students complained that Campbell used "vulgar and sexual language in their presence, as well as touched them improperly" and, that a year earlier, "two complaints were filed against him for inappropriate behavior toward children as well as a separate complaint that he was blowing kisses to a female student."[72]

The Tennessee Court never addressed the question of whether Campbell was defamed because Campbell, as a teacher, was a public official according to the court. The court granted the defendant newspaper's motion to dismiss on a holding that the newspaper had not intended to do Campbell harm. In addition, the court made Campbell pay all costs.[73] On appeal, the trial court's holding was upheld and remanded with no mention of the particular facts of the case. The only discussion was whether teachers are public officials.[74] On remand, the case was ordered dismissed. Therefore, the focus, under the public official standard, was not on the truthfulness of the publication but on the intent of the publisher.

In summary, then, school administrators who are sued by teachers for defamatory statements made in the evaluation process will have greater protection if the teacher-plaintiff is deemed a "public figure" and therefore bears the burden of proving that the administrator acted with actual malice. Even without such protection, however, administrators will have the benefit of a qualified privilege and should be able to escape liability if they have acted reasonably and in good faith.

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[70] 955 S.W.2d 609 (Tenn. Ct. App. 1997).

[71] *Id.*

[72] *Id.*

[73] *See* Order, Campbell v. Times Printing Co., 955 S.W.2d 609 (Tenn. Ct. App. 1997).

[74] *See* Campbell v. Robinson, 955 S.W.2d 609 (Tenn. Ct. App. 1997).

Fact v. Opinion

A final issue to consider is whether the communicator has made a statement of "fact" or a statement of "opinion." Traditionally, courts have held that opinions are protected, and that only statements of fact may serve as a basis for liability in a defamation suit. It is often difficult, however, to make a valid distinction between the two, so litigation often has revolved around the fact-opinion issue.

In the context of a teacher evaluation, it would seem that an administrator's critical comments about a teacher often could be reasonably characterized as a statement of either fact or opinion. For example, in *Goralski v. Pizzimenti*,[75] a substitute teacher was taken off a school substitute list because of "misconduct." Is that a statement of fact or opinion? The court in *Goralski* held that the teacher had no claim because the use of the term *misconduct* by school personnel "was mere opinion."[76]

The fact-opinion distinction also was critical to the court in *Rosenthal v. Regents of University of California*,[77] a 1990 decision involving a defamation suit by a university professor. The professor also was a department chair and, as such, was the subject of a report by a university committee evaluating the effectiveness of the department. The professor claimed certain statements in the report defamed him, but the trial court found for the defendants on the basis of a privilege. On appeal, the California Court of Appeals specifically addressed the fact v. opinion issue, concluding that the plaintiff's claim was nonactionable because the statements in the report were opinions of the reviewing committee.[78]

The United States Supreme Court recognized the difficulty in distinguishing between fact statements and expressions of opinion. In *Milkovich v. Lorain Journal Co.*,[79] the Court explicitly rejected "a wholesale defamation exemption for anything that might be labeled 'opinion.'" The Court asserted that the lower courts had misinterpreted its earlier precedent, creating "an artificial dichotomy between 'opinion' and 'fact' and ignor[ing] the fact that expressions of 'opinion' may often imply an assertion of objective fact."[80]

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[75] 115 Pa. Commw. Ct. 210, 540 A.2d 595 (1988).

[76] 540 A.2d at 598-99.

[77] 269 Cal. Rptr. 788 (Ct. App. 1990).

[78] *Id.* at 792-93.

[79] 110 S. Ct. 2695 (1990).

[80] *Id.* at 2705-06.

On its face, *Milkovich* would seem to make it easier for plaintiffs to prevail on a defamation claim. Certainly the decision eliminates as a defense the bare assertion that the defendant was expressing "only an opinion." The Court did make clear, however, that a statement can be actionable only if it is capable of being proved false; "a statement of opinion ... which does not contain a provably false factual connotation will receive full constitutional protection."[81]

The Milkovich standard, that a statement is actionable only if it states actual facts about the plaintiff that are "provable and false," continues to be the standard applied in recent court decisions. (*See Jefferson County School District No. R-1 v. Moody's Investor's Services, Inc.*,[82] *Rosa Parks v. Laface Records*,[83] and *Howard v. Antilla*.[84])

Milkovich involved a newspaper defendant, and the Court reserved judgment on whether its new standard applied to cases involving nonmedia defendants.[85] School administrators should assume the standard does apply to them, and they should not rely on the kind of fact-opinion distinction courts have employed in the past. Administrators should further assume that any critical statements they make about teachers they are evaluating might be construed as fact statements that are fully actionable in a defamation suit. This result, then, is that administrators will have to rely on a privilege defense and an absence of malice to avoid liability.

Fact versus opinion was the issue in the recent case of *Mallory v. Ohio University*.[86] In *Mallory*, two university students had sexual relations in a campus dormitory. The male student was charged with sexual assault under the university's code of student conduct and expelled from the university. The female student received counseling from the university's assistant director of the department of health.

The male student was subsequently charged with sexual battery. The trial ended in a hung jury with eleven jurors voting for acquittal and one juror voting to convict. All charges were dismissed with prejudice. After the trial the city newspaper in which the trial was held gave extensive coverage of the trial. Included in one ar-

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[81] *Id.* at 2706 (emphasis added).
[82] 175 F.3d 848 (1999).
[83] 2003 Fed. App. 0137P (6th Cir.)
[84] 294 F.3d 244 (2002).
[85] *Id.* at 2706 n.6.
[86] 121 Ohio Misc. 2d 64 (2002), 782 N.E.2d 173; (2002 Ohio Misc.).

ticle was the following statement by the assistant director of the university department of health:

> The information generated by the [university] police definitely met the definition of sexual battery, and certainly was a violation of the student code of conduct. It's not like some people want to make out, that this was two drunk people having a good time, and one of them felt bad about it the next day. For them to say [Mallory] was treated unfairly just seems kind of ridiculous, from my perspective. He definitely committed a sexual battery, from the information that was gathered.[87]

The male student filed a complaint in this court, alleging in part that assistant director had uttered defamatory statements against him. Following the liability phase of the trial, the court found in favor of the university, concluding that the ordinary reader would view the assistant director's statements as opinion and not fact. On appeal, the Tenth District Court of Appeals reversed, finding the assistant director's statement "implied that her assertion had a factual basis, and the average reader or listener could have concluded that [Woodruff] was in a position to have been privy to the information gathered by the university police; thereby viewing her statement as fact rather than opinion." The court held that "the statement involves a direct accusation of criminal activity involving moral turpitude on the part of the plaintiff, and we therefore conclude, as a matter of law, that the statement constituted slander *per se*."[88]

In *McClure v. Independent School District No. 16, Mayes County, Oklahoma*,[89] the court addressed the fact-opinion issue concerning board members' speech regarding a teacher's conduct prior to a pretermination due process hearing. The school board voted unanimously to terminate the teacher immediately. In holding the board members' speech were defamatory and violated the teacher's due process rights, the Court ruled:

> Statements like those alleged here are not mere opinions on policy issues related to the dispute, nor are they simply reiterations of charges made during an investigatory stage. *See Staton*, 552 F.2d at 914. Rather, they reveal decision makers who publicly stated their intent to terminate Mrs. McClure's employment prior to the hearing at

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[87] *Id.* at 174.

[88] *Id.*

[89] D.C. No. 97-CV-825-B (2002).

> which the matter of her termination was to be decided. [A] due process principle is bent too far when such persons are then called on to sit as fact finders and to make a decision affecting the property interests and liberty interests of one's reputation and standing in his profession.[90]

Conclusion Regarding Defamation

An increasing number of cases have been brought in the last several years by teachers who feel they have been defamed by school administrators, either in the process of formal evaluation or under circumstances relating at least indirectly to teacher evaluation. Few such plaintiffs have prevailed, however, and it is not likely that many will succeed in the future.

While the Supreme Court's *Milkovich* decision may have signaled a slight shift in the balance toward plaintiffs on the fact-opinion issue, it did nothing to undermine the other defenses available to a defamation defendant. As a result, the law still seems stacked in favor of administrator-defendants. Truth is always a defense, and even if administrators' statements are false, if they have acted in good faith, by making a reasonable inquiry into the facts and acting out of legitimate administrative motives rather than ill will toward particular teachers, they will be protected.

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[90] *Id.*

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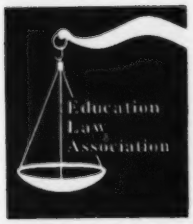

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